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the ROYAL COMMISSION on the NORTHERN ENVIRONMENT

MAKING YOUR CASE

AT THE

ENVIRONMENTAL ASSESSMENT BOARD

Funding Program Report

ROYAL COMMISSION ON THE NORTHERN ENVIRONMENT

J.E.J. FAHLGREN, COMMISSIONER

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ENVIRONMENTAL ASSESSMENT BOARD

by

D. Paul Emond
Associate Professor
Osgoode Hall Law School
York University

and

Andrew J. Roman
General Counsel
Public Interest Advocacy Centre

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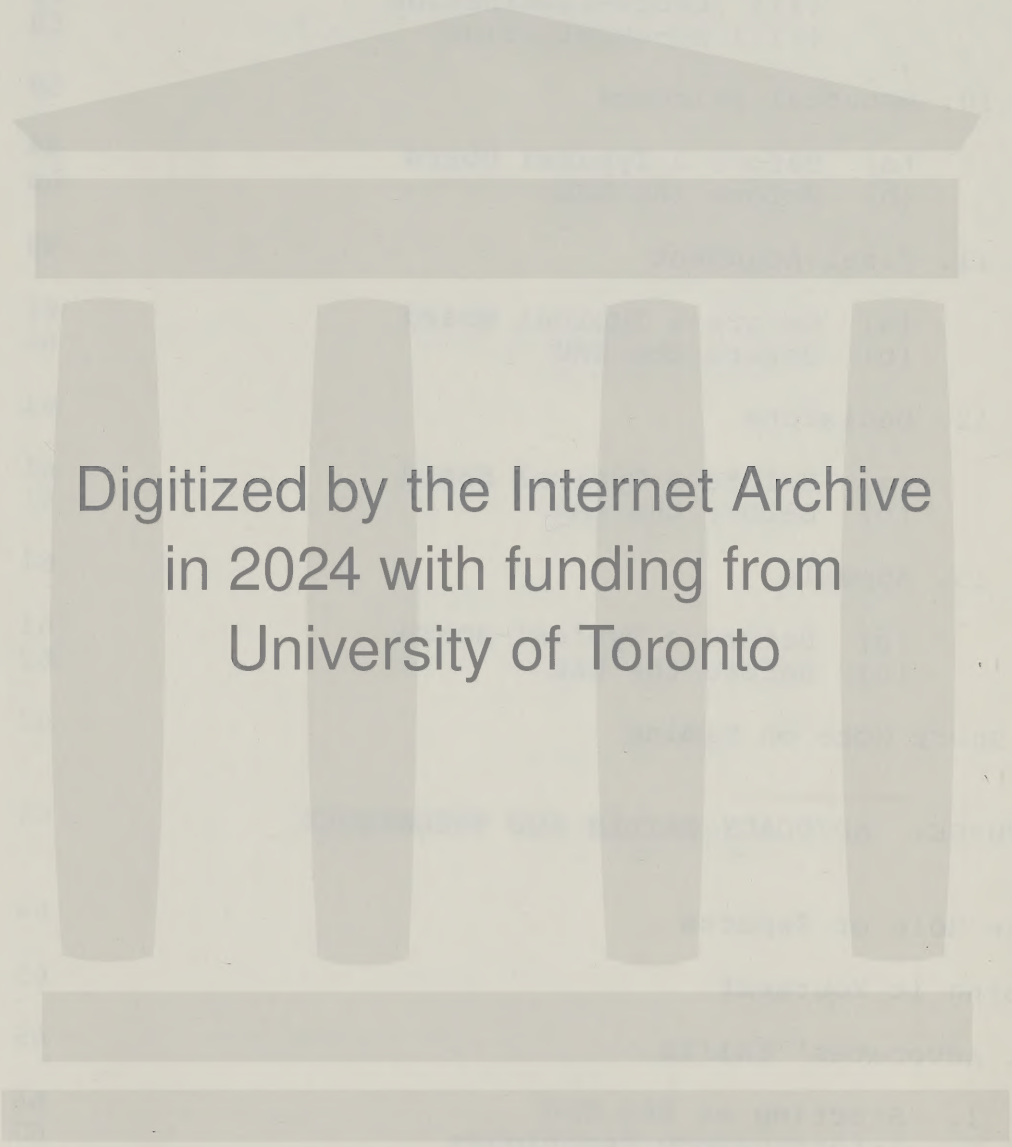

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INTRODUCTION

This book is about an Act and a Board that will soon be very important to the people of Ontario. The Act is The Environmental Assessment Act; the Board is the Environmental Assessment Board. The Act was passed by the Legislature of Ontario in 1975 and provides a new, radically different way for the making decisions about whether or not major development projects should go ahead. It is far more than just another Environmental Protection Act. And the Board has extremely broad powers over what happens. The decision whether to build a new highway, mine or hydro electric facility no longer belongs only to the Transportation Ministry, the mining company or Ontario Hydro respectively. The government has a significant role to play in these decisions.

More importantly, you as a member of the public have a role in the decision. Ultimately, many of these decisions will be made by a new Board, the Ontario Environmental Assessment Board (EAB). This Board has been set up under the Act and after it has conducted a hearing into the proposed project, it has the right to decide whether or not to give the proponent the approval he needs to begin construction.

Saying that there is a new Act to protect the environment and a new Board that will only make decisions after it has heard from the affected public means very little to most people. What value is an Act if it does not actually apply to development proposals? What value is a Board, if people do not know how to prepare their case and present their viewpoints in public?

This book does two things. First it explains in fairly straightforward language what this new Act and Board mean for the people of Ontario. Secondly, it offers a step by step guide, designed for non-lawyers, on how to prepare and present your case before the Board. You do not need to be a lawyer to participate effectively in board hearings. In some cases, you do not even need a lawyer to help you. Once you understand something about "lawyering skills" you will be surprised how effective you can be. Thus, this book explains how you can be a "lay lawyer".

This book is arranged in three parts. After providing some background information, it looks first at boards, tribunals and commissions in general. Part One takes you through some of the more difficult problems of an Environmental Assessment Board hearing. Part two takes you through the steps of a typical case and offers comments about where and how an environmental case differs from others. Part Three examines the skills you need to participate at Board hearings. It is filled with examples designed to demonstrate the right way to present your case. It takes a "how to" approach, suggesting the problems you may encounter and how to deal with them. At the end of the booklet there are a number of appendices. The most important one is the glossary of terms, and you should read it now to understand the language we use.

Additionally, individual training can be provided by simulation exercises and special seminars, if there is a genuine interest shown in participation. Andrew Roman's Guidebook on How to Prepare Cases Before Administrative Tribunals* and Paul Emond's book, Environmental Assessment Law in Canada+ provide more detailed information than can be provided here.

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* Available from Consumers' Association of Canada, 251 Laurier Avenue West, Ottawa, Ontario.

\+ Available from Emond-Montgomery Ltd., Suite 208, 56 The Esplanade, Toronto, Ontario.

1. How is This New Act Different From Other Environmental Legislation?

As you may know, The Environmental Assessment Act is not the only statute that is designed to protect the environment. About eight years ago, the Ontario Legislature passed a very comprehensive protection Act called The Environmental Protection Act. Well before that, another act was passed to protect water. It was called The Ontario Water Resources Commission Act. The Commission is gone now and the Act is known as The Ontario Water Resources Act. While these Acts and other statutes together with the new Environmental Assessment Act are concerned with protecting the environment, there are some important differences.

First, the old "protection" Acts have not done much protecting because they are aimed at correcting existing problems. Some pulp and paper operations continue to foul northern rivers even though it is often "against the law". This is partly because the old Acts are not tough enough--the water quality standards and the fines tend to be too low. The equipment in some of these "outdated" plants was not designed to meet today's environmental quality standards. Also, there is limited opportunity for people who want to preserve the environment to participate in the setting and enforcement of standards.* Everything is left to the government and it is neither big enough nor strong enough to get the companies to clean up.

The Protection Acts do not address potential environmental problems during the planning stages. The result is that the development goes ahead, pollution starts and then the government finds it very difficult to get the company to spend enough money to correct the problem. The problem with existing operations that pollute is even more serious. They almost seem to have a "right" to continue doing what they have always done.

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* In 1979, the Ministry of the Environment established a policy whereby public meetings are held before amending existing Control Orders for pollution abatement programs.

The new Environmental Assessment Act was passed to overcome many of the problems. If a company wants to construct a new facility, it must inform the government well in advance.* This gives the government and the public an early opportunity to review the proposal and it allows time to involve the public. Secondly, no one has a right to do anything that might pose an environmental risk. Before a company or another part of the Government gets permission to proceed with a project, it must get approval from the Minister of the Environment. The Minister is not likely to unconditionally approve a project if the local people are strongly opposed to it or if the project cannot be built safely. Instead, he will attach certain conditions or not approve the project at all. Finally, the new Act is concerned with more than just the water and air. It is concerned with the "quality of life". How a project will affect you and your community is now a very important factor.

2. How is this New Board Different From Other Boards and Commissions?

It is a little confusing to know at first what the Environmental Assessment Board has to do with the North. You have been asked to come and participate before the Royal Commission on the Northern Environment (now the Fahlgren Commission), and now we are telling you that you should come and participate before some new Board in the future. It sounds as if the government wants to study you and the North forever and hope that somehow your problems will disappear. You may be right. We hope not. In fact, as lawyers who know something about Boards and Commissions, we feel that this time there is a difference and that something good may come out of the Board

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* Private sector undertakings are subjected to the Act on a case by case basis. Only three private sector proposals have been designated under the Act at the time of publication.

and the Commission. Whether or not something does come out of it really depends on you. First, you must know something of the history of the two.

a) The Royal Commission on the Northern Environment

You may remember that when the Commission was set up in 1977 under the Chairmanship of Mr. Justice Patrick Hartt there was a great deal of talk about the Reed proposal for northwestern Ontario, environmental assessment and the Environmental Assessment Board. In fact, the Reed controversy was directly responsible for the formation of the Royal Commission.

When the Ministry of Natural Resources and Reed Paper announced that they had signed letters of understanding to study the harvesting of 19,000 square miles of virgin timber many northerners and indeed some southerners objected. People felt that the agreement had been made in private without any public input and without giving proper study to the potential environmental impact of the project. People also felt that neither party had addressed the "real" costs of such a project. The government responded by saying that the two parties had only signed a letter of understanding and that neither Reed nor the Government was committed to the project, should it prove inadvisable for either to proceed. People, particularly those in Grand Council Treaty Number Nine, were not satisfied. They felt that while there might ultimately be some technical reason why the project would not proceed, the Government had shown its insensitivity to environmental concern by taking this first step without a full review of all the potential environmental consequences.

Pressure for the government to do something mounted. Chief Andrew Rickard of the Grand Council Treaty Number Nine was particularly vocal in his insistence that the Reed project be stopped pending further study. Strong public opposition and the Government's minority position persuaded the Premier to turn to the old standby, the Royal Commission. The Commission was ultimately set up to examine the northern environment in

general and make recommendations about a suitable decision-making structure for ensuring that development does not proceed without due regard for the environment. Thus, the Commission is looking into proposals like that of Reed as part of its general concern with the northern environment and decision-making.

The Environmental Assessment Board will look specifically at the project and hold full public hearings. After the hearing the Board will determine the fate of the proposal. It may approve the proposal, approve it with conditions, or reject it. All the Royal Commission can really do is make recommendations to the Government about projects like Reed.

In other words, while there will ultimately be some overlap between the Commission and the Board, the Commission is looking at the north generally; the Board will focus on specific undertakings or types of undertakings. To date, the Board really only has jurisdiction to look into two private projects north of 50°-- the one by Reed* and the proposal by Onakawana Development Limited to develop the coal deposits near Moosonee by Ultimately, many more private projects will likely come under the Act and may be considered by the Board; however, whether they do or not may depend on strong public support for the Board and its work. Public projects north of 50° are subject to the Act unless they have been specifically exempted by the Minister of the Environment with Cabinet approval.

We cannot underestimate the importance of these two bodies. The Commission will make recommendations about how the public should participate in northern decision-making. The EAB provides an important forum in which you can participate in decision-making on specific proposals. In fact, for major resource development projects it is the only effective way you can participate. Thus, it is crucial that you air your views and specific concerns about major development projects.

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* Reed has abandoned the proposal and sold its pulp and paper operation at Dryden to Great Lakes Forest Products. Great Lakes has publically announced that it is planning to update the Dryden operation with an eye to the virgin forest tract as a source of pulp wood.

Only then can you properly evaluate the procedure of the Board. If you are not satisfied with it, you can then tell the Commission that they may make recommendations to the Government that the Board use a different procedure for the north. If you do not participate in hearings before the Board, it will be impossible to evaluate it and propose constructive changes.

There is another important reason for participating. Only through the Environmental Assessment Board can you hope to have an effective voice in northern development. Only before the EAB are you on an equal footing with all other parties. Thus, if you are concerned about Reed or Onakawana, you must come and participate in the Board hearings. If you do not, you miss a very crucial opportunity to have any say about whether or not the projects should go ahead.

b) The Environmental Assessment Board

The Environmental Assessment Board began as the Ontario Water Resources Commission. In 1972, as part of the Government's reorganization, the Commission was in part replaced by the Environmental Hearing Board. Then, in 1976 the Environmental Hearing Board was re-named the Environmental Assessment Board. The EAB hears many different kinds of cases including applications for waste disposal sites and sewage treatment plants. The most important matters the Board hears will be, in our opinion, those projects that come to it because they are subject to The Environmental Assessment Act. Thus, this book is only concerned with those types of hearings.

The balance of this book is about two things--how you, a non-lawyer, can participate before Boards and Commissions generally and how you can participate before the EAB in particular. Certain "advocacy skills" which are needed to appear before virually all government-appointed boards are explained and the next part explains how these Boards operate generally. Part One shows you how to use advocacy skills in context of an EAB hearing. Part Three examines the skills that you will need in more detail.

PART ONE

THE ENVIRONMENTAL ASSESSMENT BOARD: WHAT YOU MUST KNOW TO PRESENT YOUR CASE TO THE BOARD

The Environmental Assessment Board (EAB) is really not very different from dozens of other regulatory boards. Its procedures are pretty standard. Like many other important Boards, it is becoming dominated by lawyers and legal skills; but, as we will try to show you, this does not mean that only lawyers can participate. The EAB has enormous power to regulate development and hence enormous power over the quality of almost everyone's life. It is too important to ignore. If a proposed project in your region comes under the Act, it is essential that you participate in the hearing process.

Before looking at the EAB in detail, there are three things you should keep in mind. First, it is a Board that is asked by the legislation and the Cabinet to do many different things, only one of which is to determine the suitability of projects under The Environmental Assessment Act. For example, the EAB hears particularly contentious matters referred to it by Cabinet. Two good examples of this kind of hearing are the one into the proposed expansion of the uranium mines at Elliot Lake and the burning of PCB's* at St. Lawrence Cement in Mississauga. These hearings are normally conducted under Orders-in-Council, or pursuant to The Public Inquiries Act. The Board also holds public hearings into sewage treatment facilities and sanitary landfill sites. These hearings are governed by The Environmental Protection Act and/or The Ontario Water Resources Act and are again, quite different from Environmental Assessment Act hearings. Thus, the same Board holds Orders-in-Council, Public Inquiry, Environmental Protection Act, Ontario Water Resources Act and Environmental Assessment Act hearings. No two types of hearings are identical and thus

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* PCB - This is the abbreviation of a chemical compound - poly-chlorinated biphenols. PCB's are known to cause cancer.

lessons that participants have learned at one type of hearing may or may not be relevant for another type of hearing.

This leads us to the second point. At the time of writing this book there has never been an Environmental Assessment Act hearing.* What we say about procedures before the Board are, generally speaking, true. You must remember though that we are speculating a little bit about what will happen. We may not be 100% correct on all aspects of the process. This is not a serious problem. If the Board tries to adopt an unfair or irregular procedure for an Environmental Assessment Act hearing in which you are involved, you can, using the material in Part Three, bring a motion to ask the Board to deal with the problem. This book should not only provide you with the skills you need to participate effectively at a hearing, but it should also give you the confidence you need to insist that the Board treat you fairly.

Finally, and this is a point that will be emphasized again and again, the Act requires the hearing to focus on both adverse and positive impacts on the environment, as defined by The Environmental Assessment Act. This does not simply mean the natural environment -- the water, land and air -- it also means environment in the broadest sense of the word. In fact, the definition of environment in the Act is so broad that every potential impact of a project is relevant and may, therefore, be argued by you at the hearing and, if argued, must be considered by the Board in making its decision. Look at how environment is defined in the Act:

> Section 1. ....
> (c) "environment" means,
> (i) air, land or water,
> (ii) plant and animal life, including man,
> (iii) the social, economic or cultural conditions that influence the life of man or a community,

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* The first hearing under The Environmental Assessment Act commenced on April 15, 1980.

(iv) any building, structure, machine or other device or thing made by man,

(v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or

(vi) any part or combination of the foregoing and the interrelationships between any two or more of them.

Although you will really only be concerned with the first three items listed above, the full list offers you an introduction to "legalese" and one of the most comprehensive definitions of environment anywhere. This is enormously important to people who want to use the EAB to preserve not just the natural environment but also the "human environment".

The balance of this Part will be divided into five sections: How Projects Come Before the Board, the Environmental Assessment, Government Review and Written Submission, the Environmental Assessment Board, Procedure Before the Board, and Appeals.

1. How Projects Come Before the Board: What Projects Come Before the Board

By now you might be wondering why, if this is such an important Board, has it not assessed any proposed projects. It is a good question and unfortunately not an easy one to answer. There is an answer, however, and it is partly legal and partly political. The legal part requires you to understand a few difficult sections of the Act; the political part is something that you probably know as much about as the authors of this booklet.

a) Exemptions and Designations

"Legally" the Act distinguishes between public projects (government projects) and private projects (private-sector projects). Ministry of Transportation and Communications - built highways are good examples of the first, the proposed Onakawana project is an example of the second.

Section 3 of the Act says that all public projects are subject to the Act, but that only those private projects that are designated by regulation as "major commercial or business enterprises" are subject to the Act. This sounds straightforward. All government projects are under the Act, but only certain selected private projects are subject to it.

Unfortunately, this is not quite true. Even though all public activities come under the Act, they may be exempted from the Act by a "Section 30 exemption order". In other words, public projects that are automatically under the Act by reason of Section 3 may, before they are ever assessed, be exempted from the Act by the Minister of the Environment with the approval of Cabinet.

It will come as no surprise to you to learn that many public projects have been exempted from the Act by the Minister. Most are exempted because they were already underway when the Act came into force or because the government did not have the staff to review the project fully under the terms of the Act. Other projects were exempted simply because the sponsoring department did not want the assessment and the potential embarrassment of exposing their projects to a full public hearing. Thus the legal part of the explanation relates to "how" projects are exempted (or not designated), while the political part relates to the "why".

The same general explanation also applies to private sector projects, although, as you can appreciate from the preceding paragraph, it is not quite as easy to know what is happening. Only major commercial enterprises are subject to the Act. However, what is considered a major commercial enterprise has little to do with the size of the project or even the potential damage that it may cause to the environment. Only

those private projects that are designated by the government as major and commercial fall within the definition and therefore within the Act. If no designation order is made, it does not matter how big or bad the project may be, it is not subject to the Act.

Again, the legal explanation to the question of why some project is not being assessed is that it was not designated. But why the project was not designated has nothing to do with law; it may have a great deal to do with politics. Thus some projects will not be designated because the government lacks the staff to assess the project, others will not be designated because, like Ontario Hydro's Darlington nuclear station, the company will have been successful in persuading the government that its project does not need assessment or, that it should not be assessed for business reasons.

Whether a project comes under the Act and a hearing is held will depend in part on whether you are successful in persuading the Minister not to exempt it from the Act (public projects) or persuading the government to designate it as a "major commercial enterprise" (private projects). That is your first job. Make sure the proposed project comes under (and stays under) the Act. How you do this will depend upon your ability to influence the political process. Northerners' success in getting the Reed and Onakawana projects under the Act (only one other private project in the Province is presently under the Act) indicates that you already know what moves the government.

Some of the history of this important part of the Act will give you a better perspective on the job that lies ahead of you. Not only that, it will also give you some arguments to use in favour of putting a project under the Act if the Minister tries to exempt it or not designate it.

When the Act came into force in 1977 all public sector (government initiated) projects came under the Act. This included all provincial government ministry projects, all municipal projects and all "public body" projects. The last category means very little by itself because the Act states that a body is only a public body if it is defined as such in

the regulations. Ontario Hydro, for example, has been defined as a public body and therefore all its projects are automatically subject to the Act.

The task of coping with the workload from environmental assessments on all public sector projects beginning on a particular date is impossible, particularly for an understaffed Ministry like the Ministry of the Environment. Thus, the government had really no choice but to exempt almost all such projects the day the Act came into force. This it did, and the Act was quickly renamed the "Environmental Exemption Act" by its critics.

Exemptions were carried out through regulations that exempted whole classes of projects and through section 30 exemption orders. Ministries, such as Labour, Community and Social Services and Correctional Services, were exempted by the Regulations while other ministries, such as Transportation and Natural Resources, were not. Those not exempted, such as Environment, have had some specific projects exempted by the section 30 order. Thus, the regulations are used for class exemptions, while section 30 is used for individual project exemptions.

There has been little adverse public comment about class exemptions, although many have expressed concern about the integrity of the process, particularly when the Ministry of Agriculture and Food was given a full exemption. The Minister of Agriculture was the same Minister who, two years before, was responsible for getting the Act passed by the Legislature.

Where there has been a good deal of criticism is with regard to section 30 orders, particularly the order exempting Ontario Hydro's proposed nuclear generating station at Darlington, just east of Toronto. The Darlington exemption is an interesting story because it says so much about the potential for large proponents (corporations) to subvert the process, especially if the public does not care.

Section 30 states that the Minister, with the approval of Cabinet, may exempt an undertaking if he is of the opinion that an exemption:

> ... is in the public interest, having regard to the purpose of the Act weighing the same

> against the injury, damage or interference that might be caused to any person or property by the application of this Act ...

The Minister exempted Darlington for three reasons, none of which had much, if anything, to do with the criteria for exemption set out above. First, he said that a decision that the power was "required" had been made long before the Act came into force. Secondly, he noted that parts of the project would be subject to two environmental protection Acts, The Environmental Protection Act and The Ontario Water Resources Act. And, finally, he stated that Hydro had already submitted a report on the environmental analysis of the project.

None of these "reasons" is very convincing. The decision that the power was required may have been made beforehand, but subsequent electrical power demand projections have shown that it was completely wrong. An environmental assessment probably would have demonstrated how wrong the predictions were. The second point makes even less sense. Virtually all projects are subject to those Acts and therefore that cannot be used as a reason to exempt, otherwise almost everything would be exempted. The last reason might have been convincing were it not for the fact that the Ministry of the Environment responded to Hydro's assessment by noting that it was deficient in many important respects. What then was the real reason for the exemption? Unfortunately, it seems to have been political rather than legal.

A few months before the exemption order was granted, Hydro signed an agreement with the Town of Newcastle, the town where the generating station would be constructed. Under the agreement, Hydro agreed to pay the town compensation for the additional hard and soft services brought about by the project. In return, Newcastle agreed not to oppose Hydro's request for a section 30 exemption from the Act. With this agreement, the most credible potential opposition disappeared, and the Minister could exempt the project without any fear of any political repercussions.

How can you stop this kind of thing from happening in your community? For one thing, you can make it clear to the

provincial and local politicians that there will be very strong political repercussions from such an order. Secondly, as this book will point out, everything the town got in its private agreement could have been obtained after an environmental assessment. Perhaps much more. The Board can require the proponent to enter into agreements "related to the undertaking with any person". It is difficult to see how the town was disadvantaged by the exemption order. On the other hand, it is easy to see why someone like Hydro, with its poor forecasting record, would rather not subject itself to the public scrutiny of an EAB hearing.

b) What is Really Being Assessed?

Up to this point, we have assumed that the kinds of projects that will be assessed are relatively straightforward. For the most part this is correct. Mixed forestry complexes, mines, hydro-electric projects, are all suitable for assessment. You should realize, however, that the Act may apply to a far broader category of things than resource development projects. Again, we must turn to the Act on this point. The Act applies to both public and private sector projects. Section 5 states:

> (1) The proponent of an undertaking to which this Act applies shall submit to the Minister an environmental assessment of the undertaking and shall not proceed with the undertaking...."

We have used the words "undertaking" and "project" synonomously. In fact, they are not. The Act defines undertaking to include far more than "projects". Section 1 states:

> (o) "undertaking" means
>
> (i) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities, or

> (ii) a major commercial or business enterprise or activity...

Thus, a proposal, plan, or program are all potentially subject to the Act. Consider the implications of this. If the government announces a new social assistance program for the North, or announces plans to buy land from a pulp and paper company for a new park, both the program and plans themselves may be subject to the Act and thus a hearing. In this way, it is possible to assess a project in the planning stage instead of after the government has done the planning and presents it to you as a project.

When we refer to public sector or government projects, we are referring to all governments, not just the provincial government. The definition of undertaking quoted above includes undertakings by "public bodies" and "municipalities". If we turn to the Act again, we find that municipality, like undertaking, is defined very broadly. It includes:

> (h) ... a board, commission or other local authority exercising any power with respect to municipal affairs or purposes, including school purposes, in an unorganized township or unsurveyed territory;

As you can see, the Act may apply to everything from the plan to acquire land, a municipal plan to create an industrial park, or a new provincial government program. Whether the Act actually applies to these undertakings depends upon whether or not they have been exempted (public undertakings) or designated (private undertakings).

There is one thing, however, to which the Act never applies. Research and feasibility studies related to the preparation of an environmental assessment are not assessed, at least not until they are part of a proposed undertaking. Where a proposed project is subject to the Act, the proponent cannot

proceed without an approval.

Similarly, no other licence, permit, approval or consent required for the proposed project, under any statute or by-law, may be issued or granted unless an approval has been given. This does not, according to section 3, apply to a "feasibility study, including research". Thus, it is possible for a proponent to do a certain amount of preliminary work on a proposal without submitting it to an assessment. It is difficult to know when work on a proposal passes the "feasibility study" stage and amounts to "proceeding with the undertaking". Thus it would seem to be in your interest to argue that feasibility studies include only the most preliminary work. Once the proponent begins to investigate the proposal in detail, you should argue that his activity has passed the feasibility stage and cannot proceed without approval pursuant to The Environmental Assessment Act.

2. The Environmental Assessment, The Government Review and The Written Submission

a) The Environmental Assessment

The mere fact that a project is under the Act does not mean that it will be the subject matter of an EAB hearing. A hearing, if one is held, is still a number of months away and still subject to a request for a hearing. Assume that a proposed new hydro-electric project near your community is under the Act. What does this mean and when, if ever, will a hearing be held?

First, once a project (the Act uses the word "undertaking" but we will use "project") is under the Act, the proponent may not proceed with the project until an environmental assessment has been completed and the Minister of the Environment has given his approval to proceed. Ministerial approval normally means an approval by the EAB after a hearing on "behalf" of the Minister. Long before a hearing is ever held, the proponent must prepare an environmental assessment (EA). Before the proponent begins to prepare an EA, the

Ministry of the Environment will normally issue guidelines that will identify what the proponent should study in the EA. (Guidelines for the Onakawana project are found in Appendix III.) On the basis of these guidelines the proponent conducts an assessment of the project. The Act and the guidelines require the proponent to include in the EA a number of things. They are set out in section 5(3) of the Act and consist of:

(a) a description of the proposed undertaking;

(b) a description of and a statement of the rationale for,
  (i) the undertaking (project),
  (ii) the alternative methods of carrying out the undertaking, and
  (iii) the alternatives to the undertaking;

(c) a description of,
  (i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
  (ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and
  (iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effect that might reasonably be expected upon the environment,

  by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and,

(d) an evaluation of the advantages and disadvantages to the environment of the

> undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking.

When this section is read together with the earlier definition of environment it is easy to see that the nature of the investigation and study is extremely broad. The proponent must determine the extent to which the proposed project will impact upon the social and economic environment as well as the natural environment. Thus an assessment of such things as present lifestyle and new jobs should both be included in the proponent's EA document.

b) The Government Review

The next step in the assessment process is the government review of the proponent's EA document. Hopefully, this review will address all the weaknesses in the EA. But, it may not address them all. It may, for example, point out that the assessment of the impact of the project on the people was deficient because the proponent did not ask the local residents for their views on the project. It may also say that the proponent has not fully considered all possible alternatives in his EA. Or it may show that the proponent's analysis of the impact is simply not good enough.

If this is the case, the review will probably suggest that more studies should be done. Although the content of the government review is not defined in the Act, we think that it should represent the response of all the people of Ontario to this project. This may or may not mean that it also represents your views. If it does, you should find ways to get the government to work with you on your response. If it does not, you should ask representatives from the Ministry whether they have taken your views into account in their review and if not, why not.

Once the review has been completed, both the EA and the review become public documents available for your inspection.

Unfortunately, the Act permits the Ministry to wait until it has completed its review before making the EA public. This may mean that the EA will be completed three or four months before you actually see it. The longer you have it, the better prepared you will be. Keep the Ministry informed of your interest in the project and insist that you receive a copy of the EA as soon as it is submitted to the Ministry. Since the document will ultimately be made public, there is no reason why you should not get it sooner rather than later. Also, if you receive the document early enough you may point out problems to the Ministry that they may identify in their review. It never hurts to have the government on your side.

The Act contemplates putting these documents in libraries, municipal offices, and other public places. If, however, you have organized a group to participate in the assessment of the project or if you intend to participate on your own behalf you should request your own copy. It is not realistic for you and your organization to work out of a public library on such an important project.

c) The Written Submission

At this point you must remember that there isn't much time to respond to the project, the EA and the review. The Act says that the Minister must give the public a minimum of thirty days to respond. He may give you more time, particularly if the documents are very complicated, but the law does not require him to do so. Thus, you should immediately determine how long it will take you or your group to prepare a brief written submission to the EA and the review. If it is likely to take you more than 30 days, you should write the Minister and ask for an appropriate extension of time. Remember, however, that you are not preparing a "court case". You are simply responding in a preliminary way to the proposal in general and the EA in particular.

If you have some general concerns, this is when they should be communicated to the Minister in writing. Do not try to be too detailed -- there is no time for that now and there

will be plenty of time for that later. If there is anything about the proposed project that concerns you and if that concern is important enough that you want to have it examined in detail by an independent body, you should request a hearing in your submission. (The form for making a written submission requesting a hearing is at the back of this book).

There are two points we must emphasize. First, your written submission need only be detailed enough to show that you have some serious concerns about the project and the adequacy of the EA. The more general your statement the better, providing there is enough information to persuade the Minister to hold a hearing. Secondly, you cannot request a hearing unless you have made a written submission. Thus, if you want a hearing and if you want to be an equal party at the hearing, with the same rights as the proponent, you must make a written submission and request a hearing.

The purpose of your written submission is really two-fold. The first is to provide enough information to persuade the Minister to require the EAB to hold a hearing; the second is to provide some comment about the adequacy of the EA. According to the Act, your preliminary submission should only comment on the adequacy of the EA, not on the suitability of the project.

One last, but very important point, on the topic of the written submission. Based on experience to date, it would seem that the EAB recognizes two classes of intervenors -- parties and participants. As a party you can participate fully in the hearing. Participants can attend the hearing and may be allowed to ask questions, but little more. It is always better to be a party. To guarantee that you are a party, you must make a written submission and request a hearing. Even if others have requested a hearing, make your own submission and request for a hearing because others may withdraw their request, leaving it too late for you to make a request.

At this point, let us assume that all the preliminary matters are complete. An EA has been prepared and submitted to

the Minister. He has had his staff coordinate and prepare a provincial government review of the document and you have sent a written submission to the Minister and a request for a hearing. The Minister must now consider your request for a hearing and he may refuse it, if he thinks that it is "frivolous or vexatious or may cause undue delay". You need not be too concerned that a hearing will be denied for these reasons. Any reasonable request for a hearing will, we think, be acted upon by the Minister. If it is not, the Minister's refusal may be illegal. Whether it is or not, a good deal of political pressure can be brought to bear upon him to change his mind and hold a hearing.

Let us assume that the Minister has accepted your request. His next and last step is to require the Environmental Assessment Board to conduct a hearing. Once this has been done, your attention should turn to the EAB because, with one small exception at the end of the hearing, everything is now in the hands of the Board.

Once the EAB is required to hold a hearing, it will announce a time and place for a hearing and will invite all interested persons to participate in the hearing. Before we look at how you can best participate, it is important to make a few general comments about the composition of the Board and what you can expect from it.

3. The Environmental Assessment Board

Board members are appointed by Cabinet and normally serve for a three year term. At present there are sixteen members, fifteen of whom are part-time and one, the Chairman, who is full-time. Three members of the Board constitute a quorum for meetings and hearings and thus, unless the Chairman approves a hearing with less than three people, you can expect that a three member Board will hear your case. How the Board ultimately decides your case will depend in part on who is sitting at the hearing. There is, therefore, an element of chance involved in terms of which three members you get.

Nevertheless, the Board must decide the case on the basis of the evidence presented before it and therefore panel membership should not really affect the preparation of your case.

Other than to remind you that the EAB members have no special expertise in the matters that they must decide, there is not much more that can be said about them. They are not on the payroll of the proponent. They do not approve every application that they hear. They are not civil servants. They do value the evidence of citizens and public interest groups. They are obliged to give you a fair hearing. Once you realize that what you say might have an important bearing on the outcome of the case and that the Board may be just as skeptical of the technical evidence as you, the enthusiasm you put into your representation should improve dramatically.

a) Public Hearing

Under the Act, Board hearings must be open to the public. Not only can anyone come and participate by asking questions, anyone who wishes may come and watch the proceedings. There is provision for the Board to hear all or parts of the case "in camera" that is, without the public present. The Act says that the Board may adopt such a course of action, if it is of the opinion:

Section 19

> ... that matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public...

This is really a complicated way of saying that hearings shall be public unless there is some good reason for them not to be. What is a good reason? Ultimately, that is for the Board to decide. While you may feel that a hearing of this sort should always be open to the public, the "in camera" provision does offer one advantage. Proponents sometimes feel that financial and marketing information, information about new technology that they have developed, and information about possible sites for the project that are still privately owned, should all be confidential.

You will want this information. Financial and marketing information may tell you a great deal about what a company can afford, the extent to which it hopes to create a need for its product and so on. If the proponent refuses to disclose this information to you on the grounds that it is confidential, you should make the proponent show why it must be kept confidential. Questions you might ask are noted in Part Three under Motions and Objections. If the proponent convinces the Board that there is some reason not to disclose the information to the public, you can then suggest that the matter be disclosed "in camera". If you are a party to the hearing and if you give an undertaking (promise) not to disclose the information made available during this part of the hearing, you, as a party, are entitled to participate at the "in camera" portion of the hearing.

If the Board does not let you participate, object and make sure it is recorded. As a party you must be permitted to participate at "in camera" hearings, providing you respect the confidentiality of the information. If the Board refuses to make the information public and refuses to go to an "in camera" hearing, then your rights as a party have been violated. Again, object and have your objection put on the record. The principle here is that you are entitled to see whatever evidence the Board sees. Any procedure that departs from this principle is illegal. If these problems occur, consult a lawyer.

b) Two Important Questions

In every Environmental Assessment Act case, the Board has to decide two issues.* First, is the EA acceptable? That is, does it provide enough information about the project for the Board to make a decision on it? Or, to put the question in more legalistic terms, does the EA fully satisfy the requirements of section 5(3) of the Act? (Section 5(3) is reproduced above.) Once the Board has satisfied itself that the EA is complete, that is, to use the words of the Act, that it is not inconclusive or otherwise unsatisfactory and is therefore "acceptable", the Board must decide whether or not the project should proceed. And, if it decides that it should, the Board must determine whether it would be appropriate to attach certain terms and conditions to the approval of the project.

On the completeness of the EA, there may be a good deal of disagreement. For example, the proponent may argue that the word "alternatives" does not include the alternative of doing nothing. You may disagree. How this disagreement is resolved by the Board is crucial. If the Board accepts a superficial EA that does not fully explore other alternatives, it is likely to make a superficial decision on whether the project should proceed. Thus, you must insist that the EA be as full and as comprehensive as possible. We will look at some potential problems on this point in a few pages.

On the second question, the suitability of the project, there will almost always be disagreement. The proponent naturally wants a favourable decision from the EAB. You and your organization, on the other hand, requested a hearing because of certain fears that you have about the project. Unless the proponent and/or the government can dispel those

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* There may be some cases in which the Board is directed to conduct a hearing dealing only with the approval of the undertaking. The Minister may accept the EA himself, without a hearing on that aspect.

fears, you will not want the project to proceed. In this sense, there will be a contest between you and the proponent -- both of you will want the Board to accept your evidence and thus your proposed way of disposing of the case.

(i) The completeness of the EA

What exactly goes to make up these two important decisions? First, the completeness or acceptability of the EA is governed by section 5(3). If the EA does not address each and every issue raised by that Section, it is legally incomplete and therefore must be amended by the proponent before the Board can decide on the suitability of the project. Exactly what complies with section 5(3) may be a very difficult question and there will likely be some disagreement between you and the proponent on the answer. Three of the potentially most contentious problems are listed below. But remember, your suggestions on how to interpret section 5(3) may be just as persuasive as those of the proponent. If you can convince the Board to adopt a broad interpretation, this will enhance your ability to learn about the proposed project and thus your ability to persuade the Board.

Alternatives

Section 5 raises two important issues. The first is the assessment of alternatives. On the one hand section 5(3), particularly paragraph (b), parts (ii) and (iii), clearly suggest a full assessment of a broad range of alternatives. There is a problem here, however. The EAB has no power to require the proponent to carry out some alternative to the proposed project, that is not included in the EA.* It may

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* The applicant may, for example, put forward a preferred proposal and two or three alternatives that would be acceptable to it. The Board could then accept the preferred alternative. On the other hand, the proponent could, if he saw that his proposal would not be acceptable to the Board, amend his EA by adding a second or third alternative. Ministerial approval would be required for any such amendment.

accept the project or reject it, but it cannot require the proponent to do something else. If this is the case, the proponent might argue that if the Board's powers are so limited, it makes sense to impose a corresponding limitation in the interpretation of "alternatives."

This is not a particularly hard argument to meet. If the Board rejects a proposal, its decision may be based on one of two grounds: either the proposal will cause an unacceptable adverse impact on the environment, and although that impact may not be great, it will be greater than that which would flow from some alternative project. If the latter (and one can never tell before-hand), then it is clearly appropriate to conduct a full assessment of all alternatives. And, if the assessment in the EA is superficial, the EA should be amended before the Board considers the next question.

Environment

Secondly, it is important that the EA respect the definition of environment used in the Act. A preoccupation with water levels or animal counts to the exclusion of the potential impact on the human community is not acceptable. The EA must look at the social and economic environment. This means that your community must be asked by the proponent whether it wants the project.

Be careful--very careful--as to how such questions are phrased. Are they asked in such a way that most people would say yes? For example, the question "Are you in favour of better paying jobs for the community?" is not a fair question. Most people will say "yes". The proper question may be "Are you prepared to accept 'x' amount of pollution in return for 30 new jobs in the community?" You may require expert assistance to determine the legitimacy and validity of the proponent's questions. It is an area where the "experts" cannot agree and thus one that offers you considerable scope for critical

analysis and comment. Also, it is an area where you can make an important contribution because you are also an "expert" in terms of what you want.

Technical completeness

A third problem relates to the "technical" completeness of the EA. As we said earlier, the EA document will be exceedingly complex. The tables, charts and formulas are enough to discourage the most enthusiastic hearing participant. Do not be deterred. There are people who will help you interpret this information. The problem is that it may be difficult to challenge the proponent's EA, particularly its conclusions, unless you have access to the background studies on which the charts and tables are based. The EA may say that 48 moose are expected to be displaced as a result of the proponent's project. Without more information, you have no idea how accurate this information is. You can conduct your own study (a very expensive proposition) or you can demand that the proponent include its background study as part of the EA. He may or may not agree to do so. If he does not agree, you should insist that the EA is not complete until all background data and studies are included as part of it. Once you have these, you will be in a much better position to question the accuracy of the proponent's EA.

Here is another area where you might be able to get some assistance from your Ministry contact. The Ministry, in coordinating the Review of the EA, will need the same studies and reports as you need. Once the Ministry gets them, you can either ask that copies be sent to you and/or that the material be made part of the public record and therefore available to you along with all the other material on the record.

If the Board finds that the EA is deficient, it cannot reject the proposal; all it can do is send the EA back to the proponent and suggest that it be amended. This may mean that the proponent will have to conduct more research investigations and/or studies. If so, they will again be reviewed by the

Government and both will be included in the amended EA and Review. Once the EA is amended and complete, the Board must then decide whether or not to permit the proposed project to proceed.

(ii) The Suitability of the Proposed Project

Needless to say, this is where your case is "won or lost". If you have decided that the project should not go ahead under any circumstances, your participation at the hearing will be directed to that end. Similarly, if you favour the project, but want to see a number of safeguards built into it, your task will be to convince the Board that your concerns should be made the subject of certain terms or conditions that it may attach to its approval. We will discuss briefly how you present your case in the next Section. What you should remember now is that the final decision will be made by the Board members hearing the case. Their decision will be based primarily on three factors: the purpose of the Act; the EA as finally accepted; and the evidence accepted at the hearing.

Evidence will come from three sources--the proponent, the Government and the "public" participants. While it may be naive to suggest that you are equally as important as the first two, you will have an impact on the final outcome and your impact will be determined by the case you present at the hearing. If you have concerns and they are not voiced at the hearing, it is impossible for the Board to know and evaluate them, and take them into account. Thus, it is important to come to the hearing as well prepared as possible.

4. Procedures Before the Board

Let us assume that you have requested a hearing, and that the Minister has required the Board to hold a hearing. Assume also that the Board has set a time and place for a hearing and that it has advertised both in the local newspaper. Since you made a written submission to the Minister and

requested a hearing, you will be personally notified of the hearing. Don't wait until you receive notice of the hearing to begin preparing your case. Begin as soon as you hear of the proposal or, at the latest, as soon as you receive the EA and the Government Review.

Because the EAB makes a decision rather than merely a recommendation (this is one of the things that distinguishes it from the Royal Commission on the Northern Environment), the Board must follow certain procedures set out in an Act called The Statutory Powers Procedure Act, 1971. This means that the Board must behave fairly. It must give you, for example, notice of the hearing, the right to be represented at the hearing, and the right to examine and cross-examine witnesses. Also, this Act requires the Board to give written reasons for its decisions if you request them.* All these things are provided for in The Environmental Assessment Act and thus The Statutory Powers Procedure Act only provides an extra safeguard. If you feel that the Board is not treating you fairly, that it did not give you sufficient notice or did not let you question (cross-examine) the proponent's witnesses, you can ask the Supreme Court to review the matter. This is a complicated procedure, however, and cannot be done without a lawyer.

On the basis of the specific provisions in the Act and our experience with Board hearings on non-Environmental Assessment Act matters, we think that the following procedures will apply at hearings.

First, the Board will ask the proponent to present its case. Basically, this will mean the proponent will introduce its EA and any supporting studies, investigations, etc. as evidence. These documents will be given to the Board secretary and he will mark them as exhibits. You should already have copies of these documents. If you do not and if you feel that you should have had them sooner, you should ask the Chairman to

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* Section 18 of The Environmental Assessment Act requires the Board to give reasons for its decision.

adjourn the hearing to give you an opportunity to study them. Do not let the Chairman put you off. If you feel that you will be disadvantaged unless you have more time to study these documents insist that the Chairman rule on your request for an adjournment. If you are unsuccessful, don't worry. Even if you did not get the time you needed, you may have begun laying the groundwork for a successful appeal. If you feel that you simply cannot proceed without this information, refuse to participate any further in the hearing. Better not to say anything than to say something uninformed. If this situation occurs, get in touch with a lawyer. You may be able to stop the proceedings until you get the time and information you need.

Normally there will not be many surprises on the written evidence. It should all be prepared beforehand and available to you well before the hearing begins. The proponent will undoubtedly call a number of witnesses to testify on the written evidence. They will be experts and their credentials will be impressive. Do not be intimidated. They may be scientific experts but you are an expert on your own community. After making a few minor corrections and/or additions to their written evidence and after briefly explaining the results of their studies, the proponent and his experts will be available for cross-examination. You and the other parties at the hearing may question them on their evidence.

As a general rule, you cannot expect a witness for the proponent to support <u>your</u> point of view in cross-examination. If you ask him if he agrees with your concerns, he will most likely say no and <u>explain why</u>. If you tell him that your experts view the proposal differently and ask him to admit that he may be wrong, he will suggest that they are wrong and <u>explain why</u>. Each time you ask a good expert an "open-ended question" about the project, you are inviting him to emphasize again, before the Board, just how carefully he has considered the matter and how firmly he believes in his original views. Nothing is accomplished by such questioning--except to give the expert another opportunity to make his point and strengthen the proponent's case. It is better not to ask any questions than to ask these sorts of questions.

Where you can be an effective cross-examiner is with regard to the little things. Questions like:

- When were your studies conducted?
- How many people were involved?
- What was the weather like when you did them?
- How many holes did you drill (if soil tests)?
- How many water samples did you take?
- Where were the samples taken?
- What did you do with the sample after you got it?

What you <u>might</u> be able to demonstrate through such questions is that the testing procedure was faulty, the timing was wrong, too few people were involved to do the job properly, and so on. Your own experts can play a very important role here in suggesting questions to ask. Remember, though, once you get the answer you want, STOP. If the expert says "we conducted two water samples," don't ask him if he thinks that that was sufficient. He will say yes. Simply make a note of that answer and then, when you make your final argument to the Board, tell the Board members that the testing procedure was unsatisfactory. The expert cannot disagree with you then and the Board will only have your assessment of the evidence.

After you have questioned the witness, the Board may also question him. Pay attention. If the Board is concerned about something, you may be able to further develop these concerns through your own witnesses. Remember the EAB decides the case. The best argument in the world will mean very little if the Board is not listening or is not interested.

At this point, the Board will probably let members of the audience question the witness. Although these questioners are not "parties", they can have an important impact on the Board. The audience, more than anyone else, offers a good cross-section of public opinion. You should encourage your supporters to come to the hearing and, if they have concerns, to express them to the Board.

This is the format for giving oral evidence before the Board. The witness is called by the party for whom he will be testifying, sworn in by the Secretary, and then asked a series

of questions by his side. These questions, called the examination-in-chief, are designed to show how qualified this expert is and secondly, how complete, comprehensive and persuasive his written (and oral) evidence is. Once this is finished, the Government lawyer and then you and the other parties are invited to question (cross-examine) the witness. When this is finished the Board and then the audience (usually through the Board) may question the witness. As soon as this is finished, the proponent calls his second witness, and the whole procedure is repeated.

After the proponent and the Government witnesses have testified, you will be asked by the Chairman to present your evidence. Like the proponent, you may have had experts prepare studies for you. These studies will, of course, tend to show how real your concerns about the project are and will likely come to very different conclusions from those of the proponent. Your studies should have been completed beforehand and distributed to all the parties and the Board. If they have not been, you may find the proponent asking for an adjournment of the hearing while he studies your documents. Your expert evidence will be presented in exactly the same way as the proponent's. Once it has been presented, your witness will be subject to cross-examination by the proponent, the other parties, the Board and the audience.

(a) The Witness

At this point it is worth reminding witnesses of some of the things they should and should not do while they are being questioned.* While you are required to answer every question as truthfully as you can, there are some "expert skills" that you should keep in mind.

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* For further information see Guidebook on The Preparation and Submission of Expert Witness' Evidence Before the Ontario Environmental Assessment Board by Roman et al. available from the Ontario Ministry of the Environment.

(i) On Examination-in-Chief

1. Describe your evidence in simple, straightforward layman's terms. The EAB members are not experts in the field. Attempts to impress intelligent people with technical jargon are seldom successful.

2. Think of ways to make your evidence more understandable. Charts, graphics, and slide shows are often useful. Before you make any decision, make sure that the hearing room is big enough (or small enough) for what you want to do. Make sure also that you have some place to hang your charts and that they can be seen clearly by the Board. Concern with these little details may seem "nitpicking", but you will be surprised how often people forget about them until it is too late.

3. Unless you are asked for your opinion or your views on some matter, answer questions concisely. Many witnesses over-answer questions in an attempt to be helpful. This may open up new avenues of enquiry which will be used to your disadvantage by the opposition. The value of rehearsing your answers with your lay lawyer beforehand cannot be overestimated.

(ii) On Cross-Examination

1. There is seldom ever any reason to be anything but concise when being asked questions by an opposing lawyer. A simple "yes" or "no" answer, for example, puts pressure on the opposing lawyer to come up with questions quickly. This makes it less likely that the opposing lawyer can capitalize on your mistakes and makes it more difficult for him to go on a "fishing trip".

2. Answer only the question asked. Don't volunteer additional information. The better answer to the question, "Do you know what day it is?" is "yes", not "Tuesday".

3. You may be asked some difficult questions. For instance, you may be quoted out of context and then presented with a "yes" or "no" question. Don't agree or disagree with your questioner too quickly. Have the entire passage read into the record. Then you can explain its significance and, in doing so, repeat evidence given in examination-in-chief.

Also, be wary of questions that begin, "Isn't it true that...?" It is designed to box you in and trap you. A "yes" may concede the point, a "no" may make you look silly. You might resolve the dilemma with a "yes, but . . ." answer. If the lawyer tries to stop you after the "but", insist that you be given an opportunity to answer the question.

4. Remember that you need not be better qualified than anyone else to be an expert witness. Nor should you think that because you are an expert in one area you can make statements in areas in which you are not qualified.

(b) <u>The Lawyer</u>

The person or group of persons who accept responsibility to perform the "lawyer's" role at the hearing have a heavy responsibility. This person is the "master of ceremonies" at the hearing. His role is to decide how his side's performance is to be put together--the order in which witnesses should speak, the subject matter that should be covered by each witness, what should be "put in" in evidence and what should be "put in" in argument. The lay lawyer, in consultation with his witnesses, must develop a strategy. No single witness and certainly no single question or comment will win the case. The spectre of a Perry Mason asking that one final question that seals his success in the case, simply does not describe what happens in hearings.

What can be successful though, is the long, careful, often painstaking, process of both chipping away at the proponent and his case, while at the same time building up your own case. Each witness plays a small part. The lay lawyer, on

the other hand, plays the central role. Above all else, his case must be persuasive. In fact, the art of advocacy is nothing more or less than the art of persuasion. Think what kinds of arguments persuade you. That is precisely the kind of argument you are going to have to use on the Board. But remember, you are already convinced that you are right. The Board starts out neutral.

Once you and all the other parties have put in the evidence the Board will ask for final arguments. This is your opportunity to use your advocacy skills to try to persuade the Board to give you the result that you are seeking. To be effective, it must be based on a careful and selected review of the evidence.

This creates a problem. While the Board will undoubtedly keep a transcript of the hearing, the transcript will probably not be ready for you in time to assist you with your argument. You or one of your group must keep accurate notes of what is said during the hearing. If your notes are fairly accurate, you can rely on them to prepare your final argument. If they are not, you will be guessing at what was said. Rather than guess, you should probably omit the point and, for every point omitted, your argument suffers accordingly.

To be effective, you must above all be persuasive. Don't exaggerate. Don't insult the other proponent or the Board. Don't attack the integrity of the process. Offer a cool and objective assessment of the evidence. While you will undoubtedly draw inferences favourable to your point of view, don't let the Board feel that you are offering little more than an impassioned plea to go back to the good old days. It probably won't work.

(c) Terms and Conditions

The Board has the power to decide that a proposed project should not proceed. There will be some projects that are so socially unacceptable or that offer such a high risk to the environment that the EAB will exercise its power not to approve

them. Most projects, however, if they are well thought out by the proponent beforehand, will be approved. If they are not well thought out they will probably never get to the hearing stage. The Premier has stated, however, that the EAB will not bring all development in Ontario to a grinding halt. Therefore, if the project seems to have some chance of success before the Board, you must turn your argument and the Board's attention to its power to impose terms and conditions on the approval order.

The Board's power to impose terms and conditions on its approval seems to flow from a similar power in the Minister under Section 14(1)(b). It states that the (Board) may attach terms and conditions as it deems necessary, including:

(i) the methods and phasing of the carrying out of the undertaking,

(ii) the works or actions to prevent, mitigate or remedy effects of the undertaking on the environment,

(iii) such research, investigations, studies and monetary programs related to the undertaking, and reports thereof, . . .

(iv) such changes in the undertaking as he considers necessary,

(v) that the proponent enter into one or more agreements related to the undertaking with any person . . .

(vi) that the proponent comply with all or any of the provisions of the environmental assessment as accepted by the Minister,. . .

(vii) the period of time during which the undertaking, or any part thereof, shall be commenced or carried out . . .

As you can see the list covers almost everything imaginable. A few suggestions, however, will illustrate how effective this device may be in meeting your concerns.

The proposed project can be redesigned (but probably not relocated) to prevent or reduce certain adverse environmental

effects. For the Board to attach such a condition it will need very detailed technical information about an alternate technology. The starting date can be delayed and/or the project can be phased in over a much longer period of time than originally proposed. That, combined with a joint Ministry-citizen monitoring program, will give the affected parties a chance to learn more about the predicted environmental impacts before the project is full constructed and it is too late.

As a further safety device, you could ask the Board to require the proponent to post a very large bond so that if the environment is adversely affected, money is readily available to repair the damage and compensate those who have suffered losses. Other useful conditions imposed by the EAB in sanitary landfill (garbage disposal) site cases include: buffer zones around the site, approval conditional upon municipal approval of the proposed project, trees be preserved, a compensation fund be established. While there may be some legal impediment to imposing certain conditions, you should take the position that conditions are only limited by the Board's imagination and ingenuity. Don't accept any argument that a condition is illegal without first consulting a lawyer for advice.

5. The Board Decision and Your Right of "Appeal"

At the conclusion of arguments the Board will close the hearing with a promise to render its written decision within a certain period of time, usually not more than a few weeks. Under the Act, only those members who were at the hearing may decide the case. This may not preclude them from discussing the case with other members of the Board; however, they must decide the case on the basis of the evidence presented at the hearing. Indeed, it is likely, perhaps even desirable, that they do discuss the evidence of the case with other members of the Board. But, when a vote is taken, only the three members who heard the case may vote. All parties at the hearing will receive copies of the Board decision.

If you have been successful, you will have persuaded the Board to adopt some or all of your arguments. If you are

opposed to the project, this will mean a decision not to let the proponent proceed, or to let him proceed subject to restrictive terms and conditions. If you have been unsuccessful, you may still "appeal" to the Minister. There is no formal provision for an appeal in the Act. What it says is that:

> 24.-(1) Within twenty-eight days of the receipt by the Minister of a decision of the Board . . . the Minister with the approval of (Cabinet) . . . may,
>
> (a) vary the whole or any part of the decision,
> (b) substitute for the decision of the Board, such decision as he considers appropriate, or,
> (c) by notice to the Board require the Board to hold a new hearing . . .
>
> (2) . . . a decision of the Board is final, after the expiration of the period mentioned in subsection 1 (normally 28 days) . . .

In other words the Minister may, with the approval of Cabinet, overturn the Board's decision. There is, however, no formal procedure open to the parties for this purpose. If they are not satisfied with the decision they may make a representation to the Minister and Cabinet. How this is done and the likelihood of success are both uncertain. Presumably a person would contact the Minister through whatever channel was available to him. This should probably be done as a matter of course. The Minister and Cabinet have the final say and they should not (perhaps even cannot) decide without at least hearing in writing from the parties at the hearing. In any event, even if you are successful before the Board, the other

side may "appeal" (you won't know unless you hear informally) and just to be on the safe side you should have your position before the Minister.

One last point is worth noting here. The Minister also has the power to order a new hearing within the 28 day time period. If you feel that the Board did not have enough information before it at the hearing to make a reasoned decision, you might request that the Minister order a new hearing on that point or, if it is serious enough, on the whole case. While such a result may have some effect, remember that your ability to finance a sound presentation at a second hearing will be far less than the proponent's. Nevertheless, the need for a second look may be so compelling that you might wish to make such a request. Be wary of such a request from the other side, however. If you are satisfied with the Board's decision, say so and also say why a second hearing is unnecessary and would impose a severe constraint on your financial ability to participate effectively.

PART TWO
PARTICIPATION BEFORE BOARDS AND COMMISSIONS

The Government of Canada has created more than 120 boards, commissions and tribunals. These bodies make decisions affecting what you pay for oil and gas or airline tickets or telephones. They may decide whether the railway serves your community, or a pipeline is built near your community. The Government of Ontario has also created a number of provincial boards or commissions which regulate a wide variety of activities within the Province.

Some Boards such as the Parole Board or the Immigration Appeal Board, will allow only persons who are strongly affected by a decision to appear before them. However, the majority of Boards try to encourage public participation (as does the EAB) although this attempt is not always successful. Even when there is significant public participation, the experience may be frustrating for the Board, as well as for the public. For its part, the Board may see "the public" as being ill-prepared, uninformed and emotional; public participants appearing for the first time tend to see Boards as having an intimidating atmosphere maintained by an "in group" of lawyers, economists, planners and other experts who seem to know one another from previous cases. The Board may appear to use procedures which are complicated and needlessly formal.

This is no reason to be discouraged. Our experience has shown that with a relatively small amount of training, most non-lawyers can cope perfectly well with tribunal procedures. Compared to the courts, tribunals are quite informal and usually do everything in their power to assist participants, particularly those who do not have lawyers. The non-lawyer often understands the actual issues before the hearing much better than the lawyer. During cross-examination in complex environmental hearings you often see a lawyer with an expert whispering questions into his ear.

Training projects conducted by the Public Interest Advocacy Centre* in several parts of Canada have shown that a small group of concerned and interested citizens can, with a relatively small amount of training, develop the advocacy skills to function as well as or better than the average lawyer who is unfamiliar with the subject or the local area. The authors hope that you will use this book (and such training sessions as might also be arranged) to develop your skills until you feel comfortable and confident in participating in an Environmental Assessment Board hearing.

To know what to expect in a hearing you must be familiar with all the steps that might occur in a typical case. The first section sets out a very complete list of these steps. All of these steps might not occur in every hearing, but by knowing all of them, it is unlikely that any procedure will surprise you. And if the EAB leaves out certains steps which you consider useful, you will recognize how its procedures may be less than ideal.

THE STAGES OF A CASE BEFORE A TYPICAL BOARD AND BEFORE THE EAB

This introductory section describes the stages of a hearing, one by one. After describing each step before a "typical tribunal", we then indicate the extent to which that kind of procedure is available before the Ontario Environmental Assessment Board. It is important for you to know not only what the EAB does but also what other tribunals do. That way, after participating in a hearing before the EAB you might make recommendations as to how the EAB's procedures could be improved.

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* Such training sessions can be obtained from time to time on request from the Public Interest Advocacy Centre, 1407 Yonge St., Suite 501, Toronto, Ontario. M4T 1Y7

One note of caution about this section. It is difficult to find a "typical" board. For purposes of illustrating this section we are using the Federal Boards. While these Boards are fairly sophisticated and therefore provide a good model, they do differ from the EAB in one important respect. The Environmental Assessment Act assumes that many proposals will never come to the Board for a hearing. Many problems that would normally be resolved at a hearing may, therefore, be resolved by the government, the proponent and the public. Those cases that do go to the Board will usually go only because problems cannot be resolved through negotiation and discussion beforehand. Thus, you should appreciate that your most important contribution to a case may come through your early participation in these discussions, not through participation at the EAB hearings.

1. The Application

a) Before a Typical Board

Generally, cases begin with a document called an Application, or a Filing to a Board. Sometimes these may be only 20 or 30 pages long, but often they will cover many volumes, and contain numerous maps, charts and exhibits. This initiating document will usually contain the sections of the Act under which the Application is filed, a list of the reasons why the scheme should be allowed, evidence in support of these reasons (which will form the bulk of the document) and the specific permission being sought (normally simple approval, but sometimes conditions or alternatives may be involved).

b) Before the EAB

Environmental assessment cases do not begin in such a fashion. Nor do they begin with a proposal to the Board. The first step usually occurs when a proponent informally contacts the Ministry of the Environment to "feel out" the Ministry's

response to a "proposal". It will undoubtedly include some written documentation, such as feasibility studies, but none of these preliminary discussions or documents are required to be made public. At this time, the Ministry may issue guidelines for the proponent to follow in preparing his case. When such guidelines are issued, they are published in EA Update.* At this point the Ministry will assign the case a file number, and a member of the Ministry staff who will provide guidance to the proponent on what is necessary to comply with The Environmental Assessment Act. Public participation may be invited by the proponent at this stage, although it is not required by the Act.

2. Deficiency Letters

a) Before a Typical Board

After an application or proposal is received by a Board, in some cases a deficiency letter will be sent to the applicant setting out aspects of the document which the Board finds deficient. Deficiencies may include: the form of the application, the absence of certain kinds of evidence, or the evidence itself. Until deficiencies are corrected the application will not be put before a public hearing.

It is not uncommon to find deficiency letters, and the applicant's responses, on the public file which is kept for public inspection in the offices of the Board. It is useful to to inspect deficiency letters,and to examine the responses carefully, because they may point to areas of the application which were originally written in haste; sometimes hasty responses have been prepared just to satisfy the tribunal enough to get the application before a hearing. These original deficiencies are often patched up rather than corrected, and provide a good area for cross-examination or close scrutiny during the hearing.

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* EA Update: A publication available from the Ministry of the Environment which lists designations, exemptions and other news relevant to The Environmental Assessment Act. Free. Published monthly.

b) Before the EAB

Because a formal "proposal" is not made to the EAB, there is nothing comparable to the "deficiency letter". The Ministry of the Environment usually has the initial contact with the proponent*. Ministry staff may identify potential problems with the proposal, but these are not necessarily part of the public record. However, you may learn of them by establishing a contact with the Ministry. You can do this by writing to the Minister and asking that he or his staff keep you informed on the progress of the proposal. You may also learn of them at the hearing stage when you will be able to question the parties about potential problems.

As noted above, the proponent makes the initial contact with the Ministry. On the basis of the Ministry's response, the proponent may decide to take the necessary steps to receive formal approval for the proposal. The first and most important is the preparation of an environmental assessment (EA). This document is the equivalent of an application and provides a full description of the proposal as well as a full assessment of its potential impact on the environment. It is submitted to the Minister of the Environment and his staff co-ordinates a Government technical review of the document to identify deficiencies. Both the EA and the government review are public documents. So while a "deficiency document" is ultimately prepared by the government and made available to the public, it is not done until after the "application" has been submitted and the proponent formally seeks approval.

To the extent that the Ministry communicates its concerns about the EA to the proponent before the EA and review are made public, it is possible for the proponent to amend or

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* Once a proponent decides to seek approval for a proposed project, a formal submission (the environmental assessment) is made to the Minister of the Environment. This is reviewed by Government staff (review), and then both documents become part of the public file on the proposal.

withdraw his EA.* After notice is given to the public that the EA and review are available for inspection, the amendment procedure is a little more complicated. This was discussed in Part 1.

3. Notice

a) Before a Typical Board

Once the deficiency process has been completed, a hearing date will be set by the tribunal. To announce this, some form of public notice will usually be issued, often by advertisements in local newspapers. You might miss these notices if you are not looking for them. Also, some tribunals may require the proponent to mail written notice to interested persons. Anyone with an ongoing interest in the activities of the Board should ask to be put on the mailing list.

b) Before the EAB

A hearing before the EAB is not automatic under The Environmental Assessment Act. The Minister may order a hearing, but he is not required to do so in every case. If you have serious doubts about a proposed project, the best way to ensure that a hearing will be held is to respond to the proposal and/or the environmental assessment and review in writing, and require the Minister to order the Board to hold a hearing.**

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* It may be possible to cross-examine witnesses of the proponent at the public hearing as to what amendments have been made to the EA since it was first submitted to the Ministry, and why these amendments were made.

** The Act says that any member of the public may "require" the Minister to send an application to the Board for a hearing, unless the Minister considers the requirement to be frivolous, vexatious or believes that a hearing is unnecessary or may cause undue delay.

It is unlikely that your request will be denied. Once the Board receives an order from the Minister to conduct a hearing, it will notify the public and all interested parties. You will receive your own personal notice if you have made a submission on the proposal or if you have asked for personal notice. Otherwise, you will be notified of the hearing through local newspaper ads. Perhaps the best way to find out about what is happening is to ask that your name be put on the Ministry's mailing list for the specific proposal. You should also ask to be put on the mailing list for their publication, EA Update. Here you will find notices of EA's that have been received by the Ministry, reviews that are being conducted and hearings that are planned. To get on the mailing list, send your name and address to:

The Editor, EA Update
Environmental Approvals Branch
Ministry of the Environment
135 St. Clair Avenue West
TORONTO, Ontario. M4V 1P5

4. Examination of the Evidence

a) Before a Typical Board

The Public Notice usually tells you where a copy of the application or proposal may be examined and also how to obtain any additional evidence filed about the application. Usually the information is available at the office of the Board itself, but this might be inconvenient for you. A second place is the office of the applicant or proponent itself, which is often no more convenient. However, at your request, the Board may require copies of the application and evidence to be filed in the local public library, school library, or some provincial or municipal government buildings in your community. Therefore, if the usual location of the application and evidence is inconvenient to you in a particular case, ask the Board to order copies to be made available at a more convenient place.

If you know even before examining the evidence that you intend to intervene, the Board will normally require the proponent to send you a copy of the entire evidence. Thus, it should not be necessary to ask the Board to do so; a written request to the proponent should be enough. If the proponent refuses, you can request a copy simply by writing a letter to the Board with a copy of your letter to the proponent.

b) Before the EAB

The Board intends to distribute the EA and review to local libraries, municipal offices, schools and other public buildings in the vicinity of the proposed project. In addition, if you have requested a hearing, you should receive your own copies of the "evidence".

A full public record containing the EA, review and all notices is also maintained at the head office of the Ministry of the Environment located at 135 St. Clair Ave. West in Toronto and in the Regional and/or District Office of the district in which the proposal is located.

Copies of the EA and review can be purchased from the following companies:

i) photocopies: Timesavers Ltd.,
20 Bloor St. East,
Toronto, Ontario. M4W 3G7

ii) microfiche: Micromedia Ltd.,
144 Front St. West,
Toronto, Ontario. M5J 1G2

5. Intervention Statement

a) Before a Typical Board

A Board will expect you to prepare a written intervention statement in which you indicate your intention to participate in the hearing (either by supporting or opposing an application, or supporting some parts and opposing others). If the evidence is insufficient for you to decide whether to

support or oppose the plan, you should state that you oppose it until you get enough evidence to persuade you to support it.

If you decide to intervene, quickly prepare an intervention statement which meets the rules of procedure of the Board. There will always be a deadline for filing such statements, and you must meet the deadline. The deadline is often advertised in the Notice of Hearing, or it may be obtained by a telephone call to the secretary of the tribunal.

It is not enough to send the intervention statement to the Board itself. A copy of it must be served (that means sent by registered mail, unless the rules of the Board say otherwise) immediately on the proponent, and on any other parties which the Board may then, or later, order.

The intervention statement should set out, in simple, numbered paragraphs:

a) the name of your group, the number of members, and where they live; and
b) what is the nature of your interest in the matter (i.e. how are you affected by the proposal--how can it inconvenience or damage your property or lifestyle);
c) whether you support or oppose various parts or all of the application; and
d) why you support or oppose those parts or all of the application.

Further instructions on how to draft an intervention statement, and a sample intervention statement are found in Appendix II.

Once you have been accepted by the Board as an intervener, you are entitled to participate in the remainder of the case on a equal footing to the proponent and all the other interveners. Never forget this, because all parties to a public hearing including the proponent are equal, and have a right to equal treatment. You may sometimes have to fight for this right in front of particular Boards, but if you insist that you will not be treated as a "second class" party, the Board will respect you for it. If the Board treats you

unfairly, you can hire a lawyer and take the Board to the Divisional Court. (This Court will set aside a decision of any Ontario Board if it is satisfied that the procedure the Board used was unfair in a legal sense.)

b) Before the EAB

The intervention statement is similar before the Environmental Assessment Board. The intervention statement is called a written submission, but it is submitted to the Minister as a general response to the proponent's EA and the government's review, not necessarily as a preliminary step to a hearing. However, a hearing may be requested by the person who makes the written submission. A sample written submission is provided in Appendix II.

While the written submission may be the first step in the hearing process, it comes too early (usually within 30 days after the EA and review are made public and before a hearing is even announced) to serve the same function as the intervention statement noted above. The Board has no formal requirement that a second submission or statement be filed immediately prior to the start of the hearing, although it is possible that it may adopt such a course of action.

This is one area where there is confusion in the Act between general public reaction to a proponent's proposal, and a useful first step to a full public hearing on the proposal. If it is intended only as a general reaction, then a further step may be needed that would require the participants to discuss their case within a week or two before the hearing begins. Similarly, there may be some need for a requirement that the proponent make any studies that were not included in the EA available to the parties before the hearing begins. As things presently stand, only the EA, the review, written submissions, and all notice provisions and Ministerial orders are made public before the hearing begins.

6. Discovery

a) Before a Typical Board

Discovery of the evidence of the proponent is done well before the hearing, if discovery is permitted. Its purpose is to allow all parties to have all of the necessary evidence, or as much of it as practically possible, prior to the hearing. This should reduce time spent in cross-examination, and make interveners' participation better informed. Since most of the information or evidence about the proposal is within the possession of the proponent, and not the general public, discovery is always necessary.

Usually the proponent will only offer evidence which supports his case. Evidence which might show certain kinds of damage to the rights or property of others is usually either concealed in carefully-worded or extremely technical language which gives the impression that no one will be adversely affected,or is left out entirely. Your goal is to obtain this information, if possible, through discovery. Although not every tribunal has a discovery process, you might be able to persuade it to introduce one for the purposes of your case, if you can demonstrate the necessity for it.

Discoveries take two forms: interrogatories, and production and inspection of documents. Tribunals will usually have one procedure or the other, but not both.

(i) Interrogatories

An interrogatory is a written question sent to the proponent. The rules require the proponent to prepare a written reply within a certain time limit. Time limits are very important because otherwise a proponent could avoid responding to interrogatories until it is too late to be of much use to you.

In the absence of an interrogatory procedure in the tribunal's rules, try to create one yourself: you might try writing a simple letter to the proponent, or to their lawyer,

describing the information you require. A copy of this letter should also be sent to the Board. The proponent might provide the information you seek even though he is not formally required to do so.

Whenever the Board has a formal interrogatory procedure (or even if it does not) and the proponent fails to provide you with reasonable responses, or gives you no response to your informal letter, you might ask the Board to compel a response by means of a motion (described at page 83 below). Since the board would normally want to have all of the necessary evidence before it, if they understand why you require the evidence they will often make the proponent provide it.

You may be told that the information you want cannot be provided because it is proprietary or confidential. (Proprietary means that the information must be kept secret to protect business interests.) You should not give up at this stage, as this response is common. Any proponent who requests that some information be treated as proprietary or confidential should be required by the Board to demonstrate why it should be so treated, including what specific harm will come to him if the information is released. It is usually very difficult for the proponent to show any specific harm.

The proponent's reply to an interrogatory does not automatically become evidence. It is merely a response to a question you have asked. You have to take further steps to make it become evidence before the Board, if you want it to be evidence. At some point during the hearing you will formally have to file* with the Board those interrogatories you wish to use as evidence. You are also allowed to file interrogatory responses which you receive from any other party as your evidence, in case that party doesn't file it.

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* Filing of any document is done by giving the Secretary of the Board as many copies as are required by the Board's rules. Additional copies should then be served on (i.e., hand-delivered or mailed to) the proponent and such other parties as the Board may require.

(ii) Production and Inspection of Documents

Although a less useful technique than interrogatories, production and inspection of documents will allow you to see any document used or referred to by the other party in its application. If the application or proposal does not refer to any documents, then you have no right to see anything.

b) Before the EAB

The Environmental Assessment Board has no formal discovery procedures. Clearly it needs some, and by using this material and drawing on the examples of other tribunals you may be able to persuade the Board to adopt such procedures. As a minimum, you should insist that the complexity of the proposal demands that discovery procedures should be used for your hearing. While the Board has no formal procedure, it is prepared to hear your views on the appropriate approach to take in your case. This is normally done at a prehearing conference.

There are two "discovery" provisions in the Act that you can use to your advantage. First, as noted above, the Act requires that certain documents such as the EA and review must be made public. More importantly, the regulations that prescribe the form that the proponent must use when submitting his EA, require the proponent to list all studies and reports done in connection with the proposal, whether they are in his control or not. With this list it is possible to obtain the proponent's reports and studies when the hearing begins. And, with the help of the Board, it should be possible to get them well before the hearing starts.

7. Pre-hearing Conference

a) Before a Typical Board

Quite often before a hearing, a Board will hold a meeting of all of the parties (parties include the proponent and all of the interveners) to work out the scheduling and

content of the hearing. Each party will be expected to forecast what kind of evidence they will present, the number of witnesses they propose to call, and any procedural problems they might have. The Board will try to prepare a rough timetable for the hearing and the presentation of witnesses, and to resolve any initial procedural problems.

This conference is the opportunity to talk about any problems you have had in receiving responses to interrogatories. At some such conferences you may be allowed to make a formal motion (see page 83) requesting the Board to order the proponent to provide adequate responses to disputed interrogatories.

b) Before the EAB

The EAB has held "prehearing conferences" for some sanitary landfill site application hearings. Whether it will do the same thing for The Environmental Assessment Act hearings is difficult to say. This should be the minimum the Board does to help prepare the parties for the hearing. In addition to a hearing being used to generate information, it may also be used to identify areas of agreement and disagreement among the parties. Agreement on some issues at this stage would enable the hearing to focus on the contentious issues.

8. The Hearing Format, Evidence and Argument

a) Before a Typical Board

The Board (or hearing officer) usually sits at one end of the room, on a raised platform. If the Board has a lawyer present, he will have a counsel table.

There may also be one or more tables for witnesses. Normally there will be rows of tables and chairs for the media and the public. Advance arrangements can usually be made for an interpreter in whatever language is spoken locally. For example, the Berger Inquiry into the Mackenzie Valley Pipeline had interpreters in several native languages and the Canadian

Radio-Television and Telecommunications Commission has conducted hearings in Northern Quebec with Inuktitut interpreters.

There will usually be a space reserved for court reporters, who take notes in pen or by means of tape recorders. These are typed into a daily transcript in which you can read every word spoken. The transcript is usually quite expensive to get (as much as $1.00 or more per page), because it requires a large staff to prepare one of these quickly. However, you can often persuade the Board to have an extra copy available for you to read at the hearing the next day. Recent Board practise has been to let the parties make their own photocopies of the transcript as soon as it becomes available.

After the pre-hearing conference is over, there will be an exchange of interrogatories or other last minute preparations before the opening day of the hearing. Opening day often begins with preliminary motions such as further complaints about missing evidence or non-responses to interrogatories, motions on legal matters or arguments, etc. (For more about motions, see page 83 below). After a few minutes or a few hours of this, the real hearing begins.

Usually the proponent presents his case first, calling whatever witnesses he wants, or presenting whatever evidence he wants, subject to the rules of the tribunal. Then every other party, in turn, presents his case.

In a court of law every person's case would have two parts: evidence and argument. Although some Boards combine these into one stage, it is important to know the difference.

Evidence is presented by witnesses, usually under oath. Evidence is factual information, such as specific descriptions of particular damage that would occur if a proposal were allowed, expert opinions of biologists as to numbers and habits of animals living in a particular area, charts and tables, etc. Usually, some evidence must be presented, and generally some expert evidence, in order to make the argument which follows convincing. If there is no evidence before the Board to establish what the facts are, then there is nothing to refer to in final argument, since the Board cannot accept new evidence

at that stage.

You can use expert evidence to attack the evidence of other experts as being incomplete or improperly prepared, or to put forward positive evidence to show your side of the story. However, not all evidence has to be presented by the usual academically-trained experts. Anyone who is a knowledgeable, reliable witness (one who does not exaggerate or contradict himself) can be a useful witness provided that he has observed or lived in the area for enough time to have real experience. Community leaders or elders might be good examples of witnesses in this category.

Argument is the portion of the case that is not evidence or fact. It is just an argument, presented by a lawyer, or spokesman. In an argument you are allowed to say anything you want which you hope will convince the tribunal to do what you are suggesting (e.g. to turn down or approve the scheme suggested by the proponent). You are allowed to say, for example, that the proposal is a bad idea, that it is unfair, that the evidence is insufficient, and so on. This argumentative style or tone is not normally used in the presentation of evidence.

b) Before the EAB

Environmental assessment hearings follow this format pretty well. The Board usually sits as a three member panel. One member is appointed Chairman of the panel. Sometimes the Board is represented by a lawyer and sometimes Board staff are present at hearings. This is becoming more frequent in complicated cases and you can expect that a Board lawyer or technical staff member will be present. The Board Secretary or staff member usually sits beside the Board. His job at the hearing is to swear in witnesses, receive and mark exhibits and generally try and make sure that things run smoothly. Technical staff of the Board may also ask questions of witnesses in some hearings.

The parties sit at tables to one side or other of the Board and slightly in front. The audience sits behind the parties and directly in front of the Board. Off to one side of the Board there will be a witness stand (usually just a small table and chair). The hearing begins with a welcome and introduction by the Chairman. If there are no questions or motions (the legal term for a request by one of the parties for something from the Board), the hearing will then begin and follow the format outlined above.

9. Calling Evidence

a) Before a Typical Board

(i) Examination-in-Chief

When a witness first presents his evidence, it is called examination-in-chief. A single witness (or a panel in some cases) will appear to present his evidence. Many tribunals insist that witnesses swear on the Bible to tell the truth, as in a court of law. But if someone objects to being sworn, he may make an "affirmation", which means that he solemnly promises to tell the truth, without swearing on the Bible.

Examination-in-chief can be written or oral. If the evidence is complex most Boards will require that it be written and given to the parties well before cross-examination, to allow the parties time to study it and to prepare cross-examination with the assistance of experts. If the evidence is not too complex, and if the party has a lawyer (or someone functioning as a lawyer), examination-in-chief will be done orally. The lawyer will ask the questions. (For example - Have you examined the evidence of the proponent? What have you concluded?) The witness will answer.

In less formal tribunals, or in situations where you don't have a lawyer, your witness may simply appear at the witness table and present his evidence like a speech.

(ii) Cross-Examination

When written evidence is used, oral examination-in-chief is normally not allowed. The witness is sworn and the lawyer almost immediately goes into cross-examination. The witness may be permitted to make a few brief statements to summarize his written evidence, to make any corrections to typing errors or calculations, or to update any information which has changed since he wrote his evidence. However, he is not normally permitted to make any major changes to his written evidence without an adjournment of the hearing to allow the other parties time to study the new evidence.

Although the public tends to believe that only lawyers are able to cross-examine, it is not necessary to be a lawyer to ask intelligent questions - and that's all cross-examination is. Anyone who understands the subject matter of the hearing can usually learn to cross-examine, by special simulation training, in a reasonably short time.

Each party is permitted to cross-examine all of the witnesses of all other parties. One may ask the witness any question, so long as it has something to do with the evidence the witness is presenting (or failed to present) in this case, or tests his qualifications or credibility.

(iii) Re-examination

After cross-examination and questioning by the Board or its lawyer or staff, the lawyer may re-examine his witness. At this stage the witness may not introduce new evidence. However, he may clarify points of evidence which may have become confused during cross-examination. Re-examination, if any, is usually rather limited.

After re-examination (unless all of the witnesses are called in a single panel), the next witness will be called and sworn. Then the entire process will be repeated for each of

the witnesses of the proponent, and again, for each of the witnesses of all the other parties. At the end, every witness or panel of witnesses will have been examined-in-chief, cross-examined, and perhaps re-examined.

b) Before the EAB

In calling evidence before the EAB, the procedure outlined above is followed. Written evidence is usually presented orally. There are no rules limiting the way in which evidence is presented.

The Board has experimented recently with the order in which it calls the parties. We believe that it will begin with the proponent, followed by the government, and then other interveners and participants; however, there may be some deviation from this.

10. Rebuttal Evidence

a) Before a Typical Board

Rebuttal is limited to contradicting new issues raised by interveners' evidence and not covered in the original proposal. If the evidence of the proponent has been contradicted by new information presented by the witnesses of interveners, the proponent may be allowed to call one or more witnesses in rebuttal. He is free to call a new witness, or to recall one of his earlier witnesses, but he cannot introduce evidence on new subjects not covered by the parties he is trying to rebut. The danger of rebuttal evidence is that the dividing line between evidence which contradicts the evidence of the interveners and evidence which deals with new subjects will become blurred, and the proponent will be given a chance to make a case on new subjects to which interveners may not get a chance to reply. You must be very careful to see that this does not happen, and must immediately object if evidence on a new subject is presented (see page 86 on objections).

A witness who has been called to give rebuttal evidence can be cross-examined. Sometimes you can make your best points in cross-examining witnesses providing rebuttal evidence, because the very fact that rebuttal evidence is called at all indicates that the proponent considers it necessary to strengthen his case on this weak point.

b) Before the EAB

Again, this describes the procedure before the Environmental Assessment Board.

11. Final Argument

a) Before a Typical Board

After all the evidence (including any rebuttal evidence) has been presented, the hearing moves to the argument stage. Argument follows the same sequence as the calling of the evidence: the proponent is first, the interveners follow next, in turn, and then the proponent is allowed a final rebuttal. There is no cross-examination during argument.

Final argument gives the lawyer, or the spokesman for each of the parties, a chance to say anything he wants that is relevant, in order to convince the tribunal.

Often the person presenting the argument will start with a detailed summary of the evidence, outlining those portions of the evidence that he considers most useful. This will be followed by an argument designed to persuade the Board to adopt his view, and a careful definition of the order the Board is being asked to make. Sometimes, the order (decision) requested will be simple: dismiss the proposal entirely. Usually, the request will be more cautious, considering several alternatives, such as: "If you do not reject the proposal entirely, we urge you to accept it subject to several conditions such as...".

b) Before the EAB

The EAB follows this procedure.

12. Decisions

a) Before a Typical Board

After the Board has studied all the evidence and considered all the arguments, it will issue its decision. It is most unusual for a decision to be made on the same day that the hearings end, so do not be disappointed if it takes several days, weeks, or even months to get a decision.

To make sure that you get a copy of the written decision, ask the Board's Secretary to mail one to you by special delivery as soon as it becomes available. Do not trust newspaper reports of the decision, as they are frequently inaccurate or distorted. Never comment to a newspaper about a decision until you have read it and understand it.

b) Before the EAB

The EAB is required by law to send you a copy of the decision if you participate in the hearing and request that a copy be sent to you. Be sure to make the request.

13. Appeals

a) Before a Typical Board

If you think that a decision is wrong or unfair you may be able to do something about it. Do not give up. Consult a lawyer, preferably one with experience before Boards and tribunals. If you do not know the names of such lawyers, you may wish to consult the Law Society of Upper Canada's lawyer referral service (call (416) 362-5811 or toll free, 1-800-268-8470), for the names of lawyers in your area who might assist you.

It is possible to attack a Board both legally and politically. If the tribunal has made some demonstrable error of law, or totally ignored the evidence before it, you may have a legal remedy; a court can set the decision aside and require the Board to conduct another hearing. Additionally, and particularly if the proponent is a government department, agency or Crown corporation, it may be useful to appeal to the Minister or the Cabinet. The Government of Ontario is responsible to its citizens, and a decision of a Board which is clearly foolish, and perhaps strongly criticized in the media, may be overturned by the Government, even by legislation, if necessary.

b) Before the EAB

Under The Environmental Assessment Act, the Minister may, with the approval of Cabinet, change the decision of the Board or require the Board to conduct a new hearing. This must normally be done within 28 days and therefore it is crucial that you "appeal" the Board's decision to the Minister as soon as possible. How you appeal the decision is discussed in Part Two, on page 61.

A Short Note on Timing

It should be clear from everything said so far that timing is critical. Once a hearing starts it tends to move much more quickly than most people expect, leaving very little time to prepare for the next stage. That is why it is very important to prepare in advance. Find out about the hearings before they start by writing to the Secretary of the Board to obtain a schedule. Phone the Environmental Approvals Branch of the Ministry regularly to find out what is going on, when they are planning hearings, when changes to timetables have taken place and so on. Better still, find out when studies are being conducted which will result in a future hearing. Try to have input into these studies during their preparation, before the authors are committed to any particular set of conclusions.

The hearing itself should be seen as the tip of the iceberg only. If there are scientists in your area conducting a study, or if you hear at the early stages that some corporation or agency is planning some project, consult a lawyer to find out what legal approvals (such as environmental assessment hearings) they will have to obtain. You will be in a race against time, so try to get your own studies started, funded, and completed by the time the hearing is called.

Try to get some idea of the nature and scope of the project by talking to the company or government department. They will often be surprisingly co-operative if they think they can reduce future opposition. At this time you should try to obtain the resources necessary to do your own studies so that when the other studies are presented, you can be sure they are fair and unbiased. The most important single advantage that a proponent has is time. If he has been working on a project for several years before a hearing is called, he will have done a great deal of preparation. He will also have talked to a lot of people to persuade them of the importance of the project. You will not. Projects - even inappropriate ones -- develop a momentum which is hard to stop. It is most important to keep your eyes and ears open, and to start preparing for the future hearings as soon as possible. Otherwise, the project may have acquired so much momentum that the outcome may well be influenced before the hearing starts.

PART THREE
ADVOCACY SKILLS AND TECHNIQUES

THE ROLE OF EXPERTS

If you have never before actively participated in any sort of public hearing it would be best to have the assistance of one or more experts. These might include engineers, biologists, soil specialists, or lawyers.

It is unlikely that you will obtain the assistance of any expert for an entire hearing without paying him a substantial fee. However, university professors who are experts in various fields (including law) might be persuaded to donate some of their time to you (if you can cover any transportation and hotel expenses). At least, one such expert might examine the evidence submitted by the proponent, and find weak spots or areas which require further investigation. Hopefully, as the case develops and your volunteer expert becomes more and more involved with it, he might ultimately be persuaded to testify for you (make sure he has the qualifications to do this). This may not happen the first time, but if you can develop a continuing relationship with some members of a university faculty, they might provide you with considerable help at very little cost.

Of course, the quality of preparation that any expert can put into a case depends on how much time he has. It is far better to have a full-time professional consultant. Good consultants are expensive (anywhere from $250 to $750 per day). If they have some sympathy for you, they might charge a little less than their normal fee, but you cannot count on it.

In any case, if the consequences of a particular proposal are seriously damaging to the people in your area, it might be possible to raise enough money to pay experts to represent your side. If you win, it will be money well spent. If you lose, you will have a better chance at appealing the decision if you made a serious effort before the Board. Boards respect professionalism and expertise. That does not mean that

they only want to hear from experts -- they want to hear from people in the community too -- but generally, to fight experts you need experts.

Lawyers can be especially helpful in fighting the lawyers on the other side, and in cross-examining witnesses. While you don't have to be a lawyer to cross-examine, lawyers are generally more experienced at this and are likely to achieve better results. If the hearing does not last too long, and if you are willing to cover expenses of travel and hotels, there is a good chance that you can persuade a lawyer from a large law firm to provide his assistance to you on a volunteer basis, or at least for less than his normal fee. Here again, it is important to develop long-term relationships. All too often, a lawyer might agree to give you a day or two of his time to help you prepare for a case, and then might become quite involved with the problems you face, so that he spends more time than he originally intended. If that happens, make sure that you and the lawyer have a clear understanding about whether the lawyer is working for free or intends to bill you. That way, there will be no misunderstandings.

DOING IT YOURSELF

While it is always helpful to have outside experts, sometimes you will have to do it on your own. This is not necessarily a bad thing. If you are going to conduct your own case there are two sets of skills you will need to develop: those of the advocate and those of the witness.

A. Advocates' Skills

Do not neglect local people whose expertise comes from the fact that they have lived in the area for a long time and know it well. The carefully considered opinions of such people, if well-presented to a tribunal, can often have a greater

impact than the slick statistical presentation of imported experts who have studied the area for only a short time.*

1. Starting at the End

When preparing a presentation for any Board, it is good practise to start at the end: think about what you want to say at the conclusion of the case, because that will determine what order or decision you want the tribunal to make. For example, you may want the Board to reject the proposal, or to insert certain conditions. It is much easier to plan your case if you know in your own mind what you want the Board to do. So, decide what you want the order or decision to be and write it down so that you do not forget it. It is a good idea to have several alternatives so that you can make a compromise if you have to.

Once you have decided what order you want the Board to make, you have to ask yourself the question: what evidence will I have to present to the Board to persuade it to grant this order? Ask the same question for each alternative order you consider. After examining the evidence of the proponent, you will see that you will need to contradict certain points in his evidence, and to submit other information that is missing from his evidence. Now, put yourself in the position of the Board. What evidence would it take to convince you either to turn down the proposal entirely, or to insert the conditions that you consider necessary? When going through this mental exercise, remember that the Board members are probably quite unfamiliar with the area. You cannot take any of their knowledge for granted.

Having decided what evidence you will need to submit, start to prepare your own witnesses, whether they are local residents, academic experts from universities, or both. Also,

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* Local knowledge is sometimes built more on myth than fact. In one case a local resident described a "lake" as bottomless. Experts later found that it was only 28 feet deep! Be sure of your facts.

if you wish to attack the evidence submitted by the proponent, consider the two ways of doing it: calling evidence of your own to contradict the proponent or attacking his evidence in cross-examination. Both of these techniques have advantages and disadvantages. It is important to know at this stage, however, that whatever evidence you call, or whatever cross-examination you do, you must have some purpose that is closely related to the things you want to prove. That is why it is so important to work backward from the result you want to achieve.

2. Interrogatory Techniques

To make sure that you do not get into timing trouble, your interrogatories should be prepared and sent to the proponent as soon as possible. Then he has no excuse for providing a late reply.

Interrogatories must be very carefully drafted because a proponent who wants to avoid answering them can prepare a reply which is designed to escape the major point of your question, but still provides enough of "the appearance of an answer" that you cannot say that he has not answered the question at all. Any loopholes you allow in your question are likely to provide "escape routes" on reply. Draft your questions accordingly.

Interrogatories are particularly useful to obtain documentary information such as maps, studies, or financial statements. Such information takes a long time to obtain through cross-examination, and by that stage it will be too late to be useful: you won't have enough time to study it. So it is very important to get all of the necessary information as early as possible.

3. Calling Your Own Evidence

A Board will often require every party calling evidence to submit it in writing some time before cross-examination. If this is the rule and you do not do so, there is a possibility that your evidence will not be admitted. When evidence is

complicated it is generally considered more fair for each side to be given the opportunity to view the written evidence of the other side, some days or weeks in advance. Therefore, you must find out from the Board what rules it will follow with respect to calling the evidence.

Even if the Board does not require evidence to be in writing, experience has shown that it is much better for everyone, including the witnesses, to have the evidence written out in advance. This enables everyone to examine it properly and to detect possible confusions, weak points, or contradictions. The exercise of writing out evidence forces a witness to concentrate better, to think through what he is going to say, and to prepare better testimony.

When you receive the written evidence of the proponent, if you are going to use outside experts, get this evidence to them without delay. It may take a long time for them to check the calculations, or to make a list of the deficiencies and assess the need for future information from the proponent. If you intend to cross-examine the proponent's witnesses yourself, without the assistance of experts, start to read the evidence right away because it may take several readings before the weaknesses in the evidence become apparent.

4. How to Introduce Evidence

Written evidence should be prepared either in the form of questions and answers, or in an essay format, whichever the Board prefers (or, if optional, whichever you prefer). Even if all the evidence is to be presented orally, you should still write out the "script" in advance. A copy of written evidence must normally be filed with the Board and served immediately on all other parties in the case. You can obtain the list of parties from the Board.

When your witness actually testifies, he should be introduced to the Board by someone serving as his "lawyer". If that cannot be done, he should introduce himself by indicating to the Board that the evidence he is going to present was

prepared by him, or under his direct supervision, and that to the best of his knowledge the evidence is true and correct. If the expert is an independent consultant, a copy of his academic qualifications and professional experience should be presented along with the evidence. If he is a community resident, an indication of what he does in the community and how long he has lived there should be presented when he testifies.

If written evidence is not used, your witness will have to go through an oral examination-in-chief (see page 91). During examination-in-chief, you introduce your witness and have him present his evidence through a series of oral questions and answers. It is important to note that these questions may not be "leading" questions, that is, questions which are designed to tell the witness what the answer is. The witness must provide his own answers, and cannot be coached or guided by the lawyer while at the witness table.

Examples of proper questions for examination-in-chief are as follows:

Q.: Mr. Smith, how long have you lived in this area?

A.: All my life, 42 years.

Q.: During that time, what has been your occupation?

A.: I have been a hunter and trapper.

Q.: As a hunter and trapper, which animals have you hunted and trapped?

A.: I have hunted moose, and trapped fox, beaver and muskrat.

Q.: Have you examined the evidence submitted by the proponent?

A.: Yes.

Q.: Will it have any impact on the area in which you trap and hunt?

A.: Yes.

Q.: Can you tell me what this impact would be?

A.: Yes, it would ....(witness provides a lengthy answer outlining the body of his testimony).

Notice how the above questions go step by step, and establish clearly who the witness is and what he has done, but in no case is the answer given in the question. The above illustration is merely one suggestion; it may well be that you are going to ask different questions. For example, it may be helpful to establish in which area he hunts, to ensure that it is the same area, or at least falls within the area affected by the proposed undertaking described in the environmental assessment.

Examples of <u>improper</u>, <u>leading</u> questions are as follows:

Q.: Now Mr. Smith you have lived and trapped in this area for your entire 42 years, haven't you?

A.: Yes. (Although this is a leading question, as an isolated first question it may not be so objectionable because the information sought is relatively obvious and undisputed. More than one such leading opening question, will usually mean objections from the proponent's lawyer or a warning from the Board).

Q.: After studying the evidence of the proponent, you concluded, didn't you, that it would have a bad effect on the area in which you hunt and trap? (This question is leading because it <u>assumes</u>, without proof from the witness, that he has studied the area in question, that he is aware of the evidence of the proponent, and that he has concluded that there would be some impact. It is also an improper question because it suggests to him that he is supposed to find that the proposed plan is bad. Finally, the question is improper because it contains a whole lot of different statements, so that if the witness replies with a "yes" answer, it is not clear to those reading the transcript whether he has agreed with all of the statements in the question, the last one, or some of them).

5. How to Attack the Evidence of the Other Side

Most of the evidence presented by the proponent will be expert evidence. Usually it will be very carefully written to give the impression that it is all totally scientific and accurate. However, experience has shown that a great deal of expert evidence is very badly prepared; a lot of it is just plain nonsense. But how can you prove this?

In some situations, an expert of your own might be able to demonstrate that the statistical method used is incorrect or inadequate. Sometimes there are simple errors in arithmetic or the sample size is too small. This kind of attack requires a background in statistics or the assistance of a statistics expert.

On the other hand, even without any expert assistance, you can look at the assumptions underlying most written evidence. Almost all evidence starts with assuming certain facts to be true, generally with very little factual basis. The reasoning takes the form: if something is true, then it follows that something else is also true. However, if the original assumption is wrong, or simply cannot be proven, there is no way to tell whether the conclusion follows. Certain key works tend to give away the hidden assumptions.

In reading over evidence look for phrases such as "given that", "in view of the fact that", and so on. Ask questions like: "Who has given it?" Other words which are designed to conceal the presence of an assumption are:"accepting", "since", "because", at the beginning of a sentence where a statement follows as a conclusion from that assumption.

In addition to assumptions, you should watch out for interpretations of other persons' reports or studies, as these are often presented in a biased fashion. If you see a phrase like "studies show that ...", ask to see those studies; chances are they don't show that all, or if so, they also show some other things which the person quoting the study would not want you to know. Our experience has been that if there is a study which clearly supports someone's point of view, it will be

included in the evidence. A short quotation from a study, or a person's own opinion as to what the study states, is probably at least a partial distortion of the overall position of the study, and should be verified.

We are often told that Dr. so-and-so concluded in such-and-such a study that something-or-other was the fact, but when you look at the original study, you find that that conclusion was only valid in a particular set of circumstances which are nothing like the circumstances in the present case. Thus the summary of the witness will be literally true, as far as it goes, but it will be misleading because it does not tell you that the statement is inapplicable. Witnesses are forever guilty of this kind of foolish distortion, but they can get away with it most of the time because no one takes the trouble to check. Take the trouble, and you will often be amazed by what you find.

It will not always be possible to obtain the background studies or evidence referred to in the evidence of a witness, but you should always insist on it. If you cannot get it, then you should request the Board to delete from the evidence of the witness those portions which are dependent upon other studies that you have not had the chance to examine. You are on strong legal grounds when you do this. The Board must either allow you to examine and refute evidence which is contrary to your interests or it must refuse to consider the evidence for their own purposes. If the Board has the right to see the evidence, so do you: if you cannot see it, neither can the Board. In many cases you will have to be firm and aggressively insist on your rights. Don't give in. If the Board denies you this evidence and if the evidence withheld was potentially important, you can go to a higher court and get the entire decision of the Board set aside.

After you have seen all the background studies and verified for yourself as many of the references as you can in the evidence of the proponent, you should be in a position to decide what you want to do in calling your own evidence, and in cross-examination.

The ultimate limit of all cross-examination comes from the fact that most expert witnesses are offering evidence based on their opinions. If you really push an expert witness to the wall, his final comment will be: "That is my opinion. If you don't like it, get someone else who has a different opinion". Then you are stuck. You simply have to get someone who has a different opinion and who is equally expert.

6. How to Cross-Examine

The first thing to remember about cross-examination is that you do not have to do it. Only if you think something can be accomplished should you cross-examine. Often people think something will be accomplished but they are wrong, and the witness simply repeats his own story again, so that the tribunal remembers it that much better. It is much better to say in final argument how you disagree with the evidence of a witness than to try to argue with him while he is at the witness table, where he is in a better position to argue back. On the other hand, if he has made some arithmetical mistakes, overstated the facts, or simply left some things unclear, a great deal can often be achieved by cross-examining.

If the evidence of the witness appears to be ignorant of local conditions, it is quite proper to ask him how much time he has spent in the area while preparing his study, how long he has lived in the area, what other such studies he has done (if this is not already known) and so on. It may also be useful to read other studies he has done, because they may say things which contradict what he has said in this study. Or, this study may largely be the "recycled" work done in a previous study in another area.

Attacking the credibility of a witness must be done very carefully; otherwise you may make the witness appear even more credible than before. However, properly done, you may be able to demonstrate, for example, that his evidence is highly biased by virtue of what has been omitted, is unoriginal, incorrectly calculated, or just plain wrong in some way. For example,

author Andrew Roman was lucky enough to be able to show at a hearing recently that a number being put forward by an expert economist was mathematically impossible. The economist not only had to withdraw this number, but all of the conclusions based on it.

A common mistake made by beginners in cross-examination is to make speeches at the witness, to have him agree. He usually will not. You cannot build you own case through the mouths of other people's witnesses. You have to call your own witnesses to present your own side of the story.

Often evidence will give the impression that it is saying a great deal more than it is. A good witness may write his evidence to imply something that he would like the reader to believe, without coming right out and saying it.

Often, on cross-examination, your purposes can be confined to finding out not just what the witness is saying, but what he is not saying. For example:

Q.: Dr. Brown, please look at your evidence at page 46, third paragraph. If a reader of your evidence were to conclude from that paragraph that you are saying that no damage whatsoever would be caused by the construction of this dam, would that be a correct or an incorrect conclusion to draw from your evidence?

A.: That would be incorrect, my evidence does not go quite so far.

After such a question and answer, you have to decide whether the answer is good enough and you should leave it alone, or whether to risk going on with the next question, which might be:

Q.: Well, what exactly are you saying?

A.: I am saying that the damage would be very slight, although not totally absent.

Now he has given a damaging answer, which you would have been better off without.

Another use of cross-examination is to get the witness to admit the limitations of his evidence. This can be quite tricky. For example, a good way not to do it is this:

Q.: Now Dr. Brown, you studies in this area occupied only four months and the evidence is likely to be different in each different season of the year, so would you not admit that your evidence is likely to be inaccurate by assuming that it would be the same all year?

A.: No, because ... (and here the witness gives a long and confusing answer that would go on for several pages).

On the other hand, a series of questions like this might be better:

Q.: Dr. Brown, am I right that your observations of the area were made over a period of four months?

A.: Yes.

Q.: Then it would follow, of course, that you did not make observations during the remaining eight months of the year, wouldn't it?

A.: Of course.

Q.: In which case, if I were to ask you to tell me from your own personal knowledge what conditions were like in those eight months that you were not there, you would not be able to tell me, would you?

A.: Oh yes, because I can estimate it.

Q.: Ah, I didn't say that you couldn't estimate it, but my question was that you would not be able to tell from your personal knowledge, based on personal observation, what it was like for those remaining eight months, would you?

A.: No, I guess not.

Q.: It would follow, would it not, that if there were any differences in the situation from year to year,

the period of time in which you personally observed the area would not permit you to determine this?

A.: Yes, that's true.

It is not always going to be quite as easy as suggested in the above questions and answers, since the witness will usually be reluctant to make such admissions and will try to throw in all sorts of irrelevant comments which give the impression that your question doesn't matter anyway. You must be firm, and pin the witness down, repeating your question if necessary.

You are not entitled to insist that a witness answer every question with a simple yes or no. You are allowed to insist that he indicate first, whether he is in general agreement or disagreement with the question, and then, to provide whatever qualifications or reasons he wants. Do not let him obscure the point by means of lengthy and irrelevant speeches, (a favourite technique of witnesses who want to avoid answering questions).

If you have the time, look at the witness' list of qualifications and find the names of articles he has written or other testimony he has given. It may be that he has given evidence elsewhere which contradicts his present evidence. It is unfortunate, but true, that a lot of expert witnesses will say almost anything, depending on who pays them. It is quite possible that under reasonably similar circumstances in a different case, the same witness, being paid by a different client, said something quite different. More than one witness has been thoroughly discredited as a result of being "caught out" this way. He will usually try to make the excuse that there are important differences between his testimony in the other case and the testimony in this case, or between the article he wrote in some magazine or scientific publication and what he is saying now. With preparation, you might be able to demonstrate this was merely an excuse and that the witness had exaggerated the differences.

Another favourite technique of witnesses is to prepare a calculation (such as an estimate or a forecast) in one way only, when there are several equally acceptable ways, each leading to different results. It can often be shown that the particular method selected determines the result. An illustration of such a hypothetical cross-examination follows:

Q.: Dr. Brown, your calculations were based on taking the average weekly number of caribou in each of ten different locations, and multiplying that by 52 weeks of the year. Isn't that right?

A.: Yes, I did it that way because I thought that was the best way to do it.

Q.: No doubt you did, Dr. Brown, and I am not quarrelling with you, but I am wondering whether a different result would have been obtained had the calculation been based on the peak weekly movement?

A.: Probably yes.

Q.: And also, basing your calculations on the average or peak monthly movement would have produced different results?

A.: Yes, depending upon the time span of the measurement and the use of peak or average figures, the result would differ.

Q.: Dr. Brown, I would like to show you a sheet of paper on which I have made a sample calculation using the peak monthly method. I would like to file this with the Board as Exhibit 1, and to have you examine the calculations. (Witness looks at the sheet for a minute). Now, Dr. Brown, can you tell me whether these calculations are correct?

A.: Yes, your arithmetic is correct.

Q.: And would you agree with me that the answer, as calculated on this exhibit, is approximately 50% higher than the number you calculated?

A.: Yes, if you do it that way, although I don't agree that that is the way to do it.

Q.: Well, let's deal with that issue then. Dr. Brown, are you familiar with any authority which states that it is impossible or improper to do the calculation as indicated on Exhibit 1 which you have just seen?

A.: No, although I don't think it is the proper way to do it because ...(here witness makes a long speech).

Q.: I know what your opinion is, Dr. Brown, because you have now put it on the record twice. However, that's not the question I am asking you. The question I am asking you, and the question to which I would like a reply, is: Other than your own opinion, can you provide some authority which states that it is improper or incorrect to do the calculation the way it is done on Exhibit 1 just filed?

A.: No, I cannot.

Q.: Thank you, no further questions.

While the answers may not be as simple as those indicated above, and the witness may tend to repeat his original answer over and over, you can ultimately pin him down to admitting that there is more than one way to do the same calculation, and that the way you are proposing is not necessarily wrong. Then, in final argument, you are quite free to suggest to the Board that Dr. Brown rather unfairly used the method which led to the lowest possible evidence of damage, while he did not disclose to the Board that there were other methods which would lead to different conclusions. This would suggest to the Board that he was not at all an impartial expert but someone interested in "selling" a particular set of numbers because he was an advocate of a particular viewpoint. A less biased witness would indicate in his written evidence that there were several acceptable methods, and say why he preferred the one he used.

The above illustrations of different techniques of cross-examination are examples only, and are not by any means a complete list. With a bit of planning you will soon be able to

discover techniques of your own which will work well in particular situations. The key is to think through the questions in advance, write down the important ones (because you cannot make up cross-examination as you go along, unless you are very experienced), anticipate possible answers, and write additional questions on those answers. Also, use exhibits as a basis for cross-examination, presenting calculations, copies of articles written by other authors, and so on. In fairness to the witness, if the series of calculations is complicated and lengthy, or you are cross-examining him on a 30-page article written by someone else (which he might not have read), it would be given to him or to his lawyer a few days in advance. It is not considered proper to attempt to surprise a witness on cross-examination by showing him something he has not seen before and expecting him to be able to answer questions on it.

If the witness proves uncooperative, and will not answer simple questions properly, you can ask the Board to direct him to do so. A witness has a duty to answer questions and not to be evasive. If the Board declines to direct him, or if the witness continues to be evasive, change the subject and move on to another area. You can comment on his evasiveness in final argument.

In general, it is best to start your cross-examination with your strongest points first. That way the Board will be alert and sympathetic from the beginning. If you start by dragging through a lot of questioning on weak points, hoping to build up, you may find that the Board has stopped listening, or will tell you to hurry up and finish, before you have reached your better material.

Prior to cross-examining a witness, you may think that you can accomplish what you need through cross-examination. After cross-examination, however, it may become necessary to call your own witness to deal with the evidence, because you may not have been successful in getting the kind of admissions you wanted. That is why it is desirable to have your own witness who is familiar with the evidence. You may be required to call your own evidence immediately after the other witness

is finished, and may not then have enough time to recruit and prepare a new witness. Your witness should be ready before you get into cross-examination. In addition to preparing his own testimony, your expert can help you in preparing cross-examination.

FINAL ARGUMENT

At the conclusion of all the evidence for all parties, final argument will be scheduled. This will often be held immediately after the close of the evidence, or one or two days later. Often there will be many volumes of transcripts and many days of hearings of complicated evidence which must be analyzed in order to present final argument. This means that you cannot wait to start to prepare your final argument.

It will usually be necessary to make a summary of the important points of evidence heard during each day, so that you will not be presented with an impossible task at the end. It is useful to write out, in point form, the three or four most important statements made by witnesses on any particular day, with references to the volume and the page of the transcript at which those discussions are found. Similarly, any new exhibits filed should be noted and summarized. All this will make for a long day for those people participating in the hearing, but there seems to be no alternative.

Some tribunals prefer to have final argument presented in writing. However, there is a danger that the final argument will only be read by the staff, not by the Board. (The staff would summarize it for the Board.) Therefore, it is a good idea to request that there be some time allowed for oral argument, to make sure that you do have some chance to persuade the Board in person. Many tribunals will also permit a short oral argument or highlight of your written presentation; however, they will not permit you to read your written argument aloud, as this would be a waste of everyone's time.

During final argument, any evidence referred to or summarized must be correctly described. There is no faster way to lose your credibility before a Board than to be caught misleading it -- even accidentally -- as to what the evidence was. You will be amazed at how often you thought you heard a particular answer when the witness was speaking, but when you read the transcript later you will find that you got the wrong impression, or have simply remembered it incorrectly. Not only should the transcript be checked to see if the witness says what you thought he said, but it should also be quoted exactly wherever possible. (This is another reason why it is important to have access to transcripts.)

Similarly, if the final argument of another party describes the evidence differently from the way you remember it, check the transcript. If you are right and he is wrong, correct the error during your own final argument. If it is too late for that, write a letter to the Board and send copies to the other parties.

When preparing your final argument, give consideration to all evidence you have heard from all parties, and what points you think are in your own best interests.

Some people are easily discouraged at the conclusion of the case by the amount of evidence that they have heard which seems to contradict what they believe. There is no need to be discouraged, because there is a good possibility that although the Board has heard a lot of evidence, it is not impressed by a great deal of it. Do not assume that Board members are so naive as to believe everything they hear.

In final argument you are allowed to say virtually anything, subject to limitations of time that may be imposed by the Board. This freedom includes the right to comment on the witnesses called by others. You are permitted to say, for example, that certain witnesses should not have their evidence accepted or believed because the evidence of these witnesses is unreliable. You must justify such statements, of course, by statements made by your witnesses themselves during cross-examination. Do not hesitate to be critical of the evidence of witnesses, however expert they may appear to be, if you have

real reason to criticize them. A large part of final argument is usually taken up with comment on what witnesses said, and how much importance the Board should give to this evidence.

Final argument usually includes some suggestions to the Board as to what their conclusions should be, on the basis of all the evidence they have heard. When making reference to the evidence, you should quote the evidence itself (if the quotation is a page or less), or refer the Board to the volume, page and line of transcript in which the evidence was stated. Since everyone at a hearing is concerned about being misled by incorrect summaries of evidence, not much attention will be paid to what you say in final argument if you say "the evidence was", or words to that effect, without referring to where the evidence was the way you say it was. However, do not become pre-occupied with the evidence alone: the purpose of the evidence is to enable the Board to draw conclusions, so it becomes important to draw conclusions yourself and tell the Board what these conclusions are, hoping that they will agree with you.

After you have suggested to the Board what their conclusions should be on the basis of all the evidence, you can make your recommendations to the Board. Some Boards, like the EAB, have power to make final decisions; others merely make recommendations to the Minister. For those Boards in the first group, you may recommend that they dismiss the proposal entirely, send it back for further study, or whatever you believe should be done. For the second group of Boards, those that can only recommend, feel free to suggest to them what their recommendations to the Minister should be.

In going from evidence to conclusions to recommendations, follow a logical sequence so that the Board can follow your arguments. It is likely that the Board will become confused if you mix up evidence, conclusions and recommendations, and your ability to persuade them will be reduced. Of course, you are not confined to commenting on the evidence that was called, since deficiencies in the evidence, or the absence of evidence is often very important. Thus, you can say, for example:

"Evidence on such-and-such is essential to making a well-informed judgement as to whether this proposal is safe: this evidence was not presented to this Board. Therefore, this Board has no evidence from which to conclude ...".

Before the EAB

The Environmental Assessment Board usually receives written argument and hears oral argument. The members would undoubtedly be grateful if you also provided them with written argument.

7. Motions and Objections

a) Motions

Although many tribunals do not have any formal procedure for making motions, virtually every tribunal allows them, without necessarily calling them "motions". A motion is any kind of argument made to the tribunal during the case about the way the case is being run. Motions deal with matters of procedure and timing rather than with the evidence itself. Typical motions might include motions to:

- require an applicant to provide responses to interrogatories
- seek production and inspection of certain documents denied by the other side
- obtain disclosure of certain information
- obtain an adjournment to allow more time to study new evidence which has been filed
- compel the other side to conduct a study which has not been conducted

A motion is usually presented orally rather than in writing, although a few tribunals require written motions. A motion is made by standing up and saying, "Mr. Chairman, I have a motion to make. I move that" ...(here you tell the Board

what you are seeking), "and my reasons for making this motion are as follows": (here you tell the Board why your motion should be granted).

After you make the motion, every other party will be permitted to speak on it, to tell the Board whether they support or oppose the motion. At the conclusion of this, you will be allowed a final reply to rebut the arguments made by those who opposed this motion. Then the Board will decide whether or not to allow the motion.

Normally, Boards do not like motions because they use time for procedural arguments instead of dealing with the evidence. However, sometimes you have no alternative. If evidence you feel you need is being denied for example, you may have no choice but to make a motion for it. However, before you ask the Board to do something for you, try to get the information yourself by means of a telephone call or letter to the lawyer for the other side. (Do not phone his witnesses directly.) If the lawyer refuses to give you the information within what you consider to be a reasonable time limit, tell him that unless you get the information by a certain date you will make a motion before the Board. Then he knows the consequences of not providing the information, and cannot say to the Board that he did not anticipate your motion. (For your own protection, you should make notes of any telephone conversations you have with the proponent's lawyer, including a note of the date and time of the conversation. Then, when you make your motion, you can tell the Board that you sought the information on such-and-such a date, and were denied it.)

The daily proceedings before a Board should be interrupted as little as possible. Normally, at the opening day of the public hearing, the Chairman will ask whether there are any "preliminary matters to be dealt with". This is the time to make any motions about problems which have arisen. If the Chairman forgets to open the session this way, and invites a party to call evidence before you have made your motion, you must immediately, but politely, interrupt the Chairman, suggesting to him that before he hears the evidence, there are

certain preliminary matters that need to be attended to, such as the motion you wish to present. This is not considered rude, and indeed, may be essential. Then the Chairman will allow you to present your motion, or will set aside another time for it.

If your need to make a motion arises after the opening period of the first day, the next best time to make it is at the opening of the hearing on each following day. The Board Chairman will usually set aside time for preliminary matters at the opening of the hearing each day. If, for some reason, your motion cannot wait until the opening of the next day's hearing, the second best time to make motions is at the opening of the afternoon session, immediately after lunch, or even after coffee breaks. But you should not make motions which interrupt testimony, such as in the middle of the evidence-in-chief of a witness or during his cross-examination.

Sometimes a Board will decide a motion immediately after it has been argued, but if the motion is complicated, it may "reserve" judgement and present it at a later date. If your motion was for the disclosure of certain information from a particular witness and that witness might be leaving the hearing before the Board's decision might be announced, you should suggest to the Board that you require their decision prior to the departure of the witness, unless the Board is prepared to recall the witness to the hearing should your motion be allowed. Without intending any harm to you, Boards will quite innocently forget this, and your gentle reminder of the timing problems that might arise from a reserved judgement will protect your rights.

It may well be that the rejection of a motion you have made would cause your participation in the balance of the hearing to be futile. If a critical piece of information that you are seeking is denied you, you may have a further legal remedy in the courts. Since much of the battle that takes place before Boards is just a battle for information, it is important to anticipate what motions will have to be made, and to plan your strategy beforehand. If you can no longer meaningfully participate in a case because a particular motion was

rejected, consider retaining a lawyer and having him ready to bring an application in court to compel disclosure of the information immediately.

Another choice is to walk out of the hearing. This should not be done just as a display of bad temper for not getting your own way. But, if the evidence you need to make an important argument is denied you and you feel that there is no point in your continuing, you might as well walk out rather than hang around the hearing room without the weapons you need, and by your very presence, lend dignity and credibility to a process in which you no longer have a fair chance. There is no law that says that you are required to continue to participate in a process which seems unfair and unreasonable to you.

b) Objections

Objections are a special type of motion usually made during cross-examination. If a cross-examiner is asking a question which is unfair to the witness, the witness himself (if he has no lawyer) or the lawyer representing the witness can object. For reasons discussed below, it is most awkward if the witness does this himself and it should only be done as a last resort.

Although any unfair question or series of questions might justify an objection, generally objections fall into a few categories. For example, a cross-examiner is not permitted to "badger" the witness, that is, to ask the same question over and over, trying to make the witness change his answer. On the other hand, if the witness has never answered the question properly, the cross-examiner would respond to such an objection by saying that he is not badgering the witness, he is still seeking his first reply.

Another ground for objection would be if the cross-examiner were to confront the witness with a statement he had made in another hearing, or confront him with an article written by another author without showing it to him first, and have him indicate his familiarity without giving him time to read it. It is also unfair to ask the witness a

question when that question involves a hidden assumption: for example, asking the witness whether he prefers alternative (a) or alternative (b), without telling the witness that there are several other alternatives, is to force the witness to assume that there are only those two. In such a situation the correct objection would be to interrupt the cross-examination with words such as:

> "Mr. Chairman, although I am most reluctant to interrupt cross-examination, I find that I must object. Mr. Jones has asked my witness whether he prefers alternative (a) or (b). However, there are several other alternatives, which have not been presented to the witness. If the questioner wishes my witness to assume that there are only two alternatives which exist, alternatives (a) and (b), and force him to choose between those two alternatives, then he should make that forced choice a part of his question. Otherwise, in fairness to the witness, he should indicate what all the alternatives are and then ask the witness to choose which one he prefers".

If the objection is sound, in most cases the cross-examiner will simply reword his question without opposing the objection. In some situations, however, the cross-examiner will attempt to bully an inexperienced objector by ignoring the objection and going on as before. This should not be permitted, but a tribunal will sometimes let a lawyer get away with this if the objector appears unsure of himself. Do not let yourself be pushed around. A properly made objection is like a motion, and is supposed to stop the questioning until the Chairman has made a decision.

Once you have made your objection, the other side must either concede your objection or respond to it, and the Chairman must rule on a disputed objection before cross-examination continues. If the other side ignores your objection and

continues to cross-examine, you must immediately repeat your objection as follows:

> "Mr. Chairman,there is an objection before the Board on which there has not yet been a ruling.The cross-examination cannot continue until you rule. It is most arrogant for Mr. Jones to assume that you have ruled in his favour before he has even bothered to make his arguments on the objection, and before you have made your ruling."

Sticking to your guns in this manner will earn the respect of the Board and the other side. There must, however, be some genuine and serious unfairness to your witness before the Board will intervene. You cannot object simply because the it is a hard question for your witness to answer, or because he hasn't done his homework. As long as the question is relevant to the witness' evidence and is not unfair, it may be asked.

It is most ackward for a witness himself to object to the question being asked to him on the grounds that it is unfair, because he can easily give the Board the impression that he simply does not want to answer the question. That is why it is important to have a second person playing the role of the witness' lawyer, even though that person might not be a lawyer. The process of cross-examination is really designed with two actors in mind: lawyers and witnesses. For the lawyer (or person playing that role) to give evidence himself is improper, and for the witness to start making objections about the fairness of questions casts doubts on his credibility. Therefore, even if no one on your team is either an expert witness or a lawyer, it is desirable to choose whoever you think would be the best a providing evidence, and make him "the witness", and whoever you think would be best to protect him from improper questions, and let him function as "the lawyer".

WITNESS SKILLS

Generally, the more expert a witness, the better. His testimony should be prepared with great care because once he comes forward to testify, he may be cross-examined by the other side. The purpose of cross-examination is to find contradictions or errors in his evidence; if there are any, chances are they will be found.

1. Conduct

How the witness conducts himself before the Board is most important. He should answer questions as straightforwardly and honestly as he can without trying to sound "clever" or being belligerent when he is questioned by lawyers or by the Board. If he does not know something, he should honestly admit it. Guessing can be a very dangerous game. When a witness is caught having made a mistake, it is far better to admit it and cut your losses quickly, than to have the admission dragged out over an hour of cross-examination, bit by bit. A witness who stubbornly refuses to admit an obvious error can, in final argument, be made to look foolish and dishonest.

2. Dress

What the witness wears can also be important. Usually, expert witnesses will wear business suits. So will the lawyers present, as well as the members of the Board and the Board's staff. That does not necessarily mean that you have to look the same. It can be highly desirable to dress differently if you wish to emphasize that difference. On the other hand, should you decide, for tactical reasons, that you do not wish to emphasize differences, it may be desirable to dress the way they do. How you dress makes some kind of non-verbal statement about yourself. Thus, the non-verbal statement you choose to make about yourself, through your dress, should be a conscious choice, and made as part of your overall strategy.

The difference between the lawyers in their three-piece suits and the native people in traditional clothes had a major impact before the Berger Inquiry. If you are trying to convince the Ontario Environmental Assessment Board that a project would be damaging to your lifestyle because you live by means of hunting and fishing, but you come to the hearing looking like bankers rather than hunters and fishermen, this can reduce your ability to be convincing. On the other hand, if you work for the Band Council and are often seen wearing a suit or a sports jacket, the Board might well think you are "putting them on" if you dress differently from the way you normally dress.

3. Preparing Evidence

In preparing to testify, write out your evidence in point form, if possible, and relate it to the final arguments you want to make. It has been the experience of several major inquiries (such as Berger and Lysyk) that inexperienced participants wasted a large portion of their resources gathering evidence which had very little relevance to the case. Some of this is heard politely, then ignored; some will be rejected without being heard, because it falls outside the scope of the inquiry. Before preparing evidence, then, consider what the inquiry is about, and what evidence is likely to be useful. Look at the evidence called by the other side, and find out where there are gaps you wish to fill or where you wish to contradict it.

4. Timing

If the rules of a Board require written evidence to be provided by a certain date, make sure that you make that deadline, otherwise your entire evidence may be rejected. Fairness is important in hearings, and this means that everyone must live by the same rules. If you find the timetable for the presentation of evidence to be unfairly short, then make a motion to the Board (in writing, before the hearing starts, if

necessary) to extend the timetable. If you still cannot meet the timetable, and have legitimate reasons for requiring an extension which is not granted, you may have to decline to call evidence (or even withdraw from the hearing and seek legal remedies after it). It is often better present no evidence at all then to present very weak evidence which is easily torn apart in cross-examination.

5. Oral Presentation

If and when you do testify, speak slowly and clearly. The Board cannot possibly remember everything you say, and will have to consult the transcript. If you speak too quickly, the court reporter will probably make mistakes in recording what you say. Then when the Board reads the transcript, your words will appear confused and disorganized. For the same reasons, you must speak loud enough for the court reporters to hear you at all times.

If you notice that the Board members are writing, this is a good sign. They have probably decided that you are saying something important, and want to write it down so they can look it up in the transcript later. If this happens, slow down a bit. Give them time to write it down, so that what you say will have as much impact as possible. Also, keep your eyes on the Board from time to time to watch their reaction. If they appear confused, slow down. Try to think why they might be confused, and clear up any confusion, if possible. If they look bored, try changing your tone of voice.

Boards, including the EAB, will usually not allow witnesses to read out evidence from a prepared text. If you have written evidence, it should be filed beforehand. However, you are allowed to make notes on a piece of paper and to deliver that in your own language, or to summarize or highlight a few points in evidence you may have already presented in writing.

6. Understanding the Question

When you are being cross-examined, make sure you understand the question. Some cross-examiners may not quite understand the question they are asking, or the point you were making, and will ask you a question which does not really make sense. Do not try to be a good guy by answering such a question, as you may give an answer which makes you look foolish later. Either ask the cross-examiner to repeat the question, if you have not heard it properly, or simply say that you do not understand the meaning of the question and would like him to reword it.

7. "Yes" or "No" Answers

If the cross-examiner asks you to answer a question with a yes or a no, do so only if you feel that it is fair. A witness is always free to answer "yes, but", or "no, but", so that he explains fully what he is agreeing or disagreeing with, and why. On the other hand, sometimes you will not be able to answer a question the way it is worded because it does not make sense, or because the information is not available. You are free to say that the question simply does not make sense to you, or to provide some other reason as to why you cannot answer it. However, if you can answer another question that you think will be useful and that is related to the question you are being asked, you may wish to offer to answer that question instead. (Contrary to this advice, many lawyers feel that it is better not to volunteer any information whatsoever, since it is the role of the lawyer on the other side to make witnesses look bad, not good. Therefore, the fewer opportunities you give him, the better.)

8. Lawyers' Tricks

Lawyers use lots of tricks in cross-examination. Be careful of these and keep alert. Do not, for example, allow

lawyers to put words in your mouth. A favourite trick is to take the evidence you have just presented and to say: "In other words what you are saying is so-and-so". In this case the lawyer is summing up what you have said somewhat differently from the way you have said it. You may not immediately see the importance in the slight difference in wording, and from a desire to be co-operative, you will agree. Then the lawyer will ask you a series of questions which show that the statement you have just accepted as being your evidence leads to a contradiction elsewhere in your evidence. So, watch out for words like: "In other words". You are allowed to reply:

> Those are your words sir, not my words. I don't know what your words mean, or why they are better than my words, but I have given you my evidence in my words, and I prefer to stick to those."

Another favourite trick is to give the impression that there are contradictions in your evidence by slightly mis-stating your evidence, for example: "Before you said that, and now you are telling us this ... make up your mind which you mean". Your reply is that your evidence was not quite what he said it was, you do not agree that there is any contradiction, and that the transcript will speak for itself as to what you said. This last comment may avoid your having to restate your evidence precisely as you stated it before. (You might put it somewhat differently, and give him more opportunity to say that you made the same point differently at different times.)

Another favourite trick is to quibble with the words you have used, picking a word here and a word there. Do not get dragged in to a word-by-word trap. Every word should be read in the context of every other word with which it appears, and not in isolation. If a total sentence or a total paragraph summarizes what you meant to say, tell the lawyer that the paragraph or sentence should be read as a whole, and that while individual words here or there might always be changed, the paragraph or sentence correctly summarizes the thrust of what

you intended to say. On the other hand, if you have misstated something, accept any useful correction the lawyer might suggest to you, but don't be pushed any further.

It is impossible in the space of this short book to provide you with a long list of all the tricks lawyers use, or how to defeat them. That can only be done by means of simulation exercises. These can be made available through the Public Interest Advocacy Centre, in certain cases, resources permitting. However, on the basis of this book alone, you should become alert to some of these tricks and keep your eyes open for them at the Board hearings.

REQUESTS FOR FUNDING OR COSTS

Normally, Boards and Commissions do not have budgets to provide funding to interveners. However, this situation seems to be changing slowly,* and it may be possible to obtain some financial assistance in a case. Rather than waiting until the opening of the hearing, when it is probably too late, as soon as you hear about the case contact the secretary of the tribunal and find out what can be done. Several alternatives are possible.

First, the tribunal itself may request the Minister to provide funds, in order to create a hearing where the parties have more balanced resources.

Alternatively, the Board may award "costs" to be paid by the proponent to such parties as the Board finds made a useful contribution. If this happens, the costs will not be awarded

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* The Government of Ontario has provided funding for some intervenors in the Elliot Lake hearing, and has agreed to fund local residents in the PCB hearing in Mississauga. The EAB has a policy to fund expert witnesses in situations where the Board is of the opinion that all of the information necessary for a decision has not been presented at a hearing. To date such funding has not been provided.

until after the case, and then only if the Board found your participation valuable. Normally, costs can only be recovered for out-of-pocket expenses such as travel, postage, or photo-copying, as well as fees for consultants, expert witnesses or lawyers. An argument can be made, however, to pay non-experts for salary lost while taking time off work to be at the hearing. If you know that costs may be awarded, you can possibly persuade some experts and lawyers to work for you on the basis that if you recover costs they will be paid, if not, their time will be considered a donation. Thus they would send you a bill for their services in any event, and if you cannot pay it, they would simply have to write it off.

It is recommended that you make a strong argument to the Board for costs as early as possible in the case, and even if you do not succeed in one case, repeat the argument to the Board and to the Minister, using precedents in other areas. Now for example, the Canadian Radio-Television and Telecommunications Commission has awarded costs to intervenors against Bell Canada in telephone rate cases. For several years the Newfoundland Public Utilities Board and the Alberta Public Utilities Board have been awarding costs to intervenors in similar cases, based on the reasoning that to work properly, the regulatory process requires two adversaries.

Before you make these arguments, however, you should have some idea which experts you would like to hire if you get funding, how much they will cost, and what their function would be. In other words, be prepared to answer the question: What do you want the money for, and how much do you need? Also, be prepared to account for the money carefully, because whether costs are awarded after the case, or funding is provided in advance, you will have to explain where every dollar went by means of invoices and cancelled cheques.

APPENDIX I

GLOSSARY OF TERMS

AFFIDAVIT:

A document which contains facts or evidence known to the person making the affidavit, and which he swears is true, before a lawyer or other commissioner of oaths (person authorized to swear affidavits).

ALTERNATIVE:

Includes alternative technology, alternative sites, and alternatives to the proposal including the alternative of doing nothing.

APPLICANT:

One who applies for or seeks any order from a tribunal or Board, which, before the Environmental Assessment Board would be called a proponent.

ARGUMENT:

The portion of the case, following the evidence, when lawyers or other representatives of the party sum up their positions and make recommendations to the Board as to what its decision should be. A Board may call for argument to be presented orally or in writing.

BOARD (EAB):

Environmental Assessment Board (EAB),
1 St. Clair Avenue West,
Toronto, Ontario.

BOARD SECRETARY:

Mr. Tom Murphy,
Ontario Environmental Assessment Board,
1 St. Clair Avenue West,
Toronto, Ontario.

CHAIRMAN OF THE BOARD:

Mr. Kenneth H. Sharpe,
Ontario Environmental Assessment Board,
1 St. Clair Avenue West,
Toronto, Ontario.

CROSS-EXAMINATION:

The portion of the evidence of the witness which follows examination-in-chief, during which the witness is questioned by lawyers or other representatives of other parties in the hearing.

CROWN:

The Government of Ontario.

DISCOVERY:

The opportunity to find out what evidence the other side has prior to the opening of the public hearing.

E.A.B.:

Environmental Assessment Board (EAB),
1 St. Clair Avenue West,
Toronto, Ontario.

ENVIRONMENT:

The definition used in the Act is so broad that it includes virtually everything. Thus, not only is the natural environment a concern of the Act, but the social, economic and human environment also falls within the Act.

ENVIRONMENTAL ASSESSMENT (EA):

A document prepared by the proponent, submitted to the Minister and then made available to the public for their comments. It provides a comprehensive description of the proposed project, the need for the undertaking and alternatives as well as an evaluation of the possible impact that it may have on the environment. This document forms the basis of the proponent's case for purposes of the hearing.

EVIDENCE:

The testimony of a witness, either orally or in writing, usually submitted under oath and subject to cross-examination, and called by any party to a hearing.

EXAMINATION-IN-CHIEF:

Portion of the evidence presented by a witness in which he puts before the Board or Court who he is and what he is saying as being his evidence. This may be done partly or entirely in writing.

EXEMPTION:

A regulation or order exempting a project from The Environmental Assessment Act.

FEASIBILITY STUDY:

Preliminary work on project. A feasibility study is exempt from the Act.

"IN CAMERA" HEARING:

A hearing held in private which members of the public may not attend. Parties may attend the "in camera" hearings.

MAJOR COMMERCIAL OR BUSINESS ENTERPRISE:

An enterprise that has been designated by the Minister and/or regulations as a major commercial or business enterprise.

MINISTER:

The Honourable H.C. Parrott, D.D.S.,
Minister of the Environment,
135 St. Clair Avenue West,
TORONTO, Ontario.
M4V 1P5

MINISTRY:

The Ministry of the Environment,
135 St. Clair Avenue West,
TORONTO, Ontario.
M4V 1P5

MOTION:

Formal request by a party to have the Board order something. Motions can be at the prehearing conference or at the hearing itself, or any time before the final decision of the Board. They can be oral or in writing, and can, if necessary, be a little "hearing within a hearing" with witnesses being called and cross-examinated.

OBJECTION:

A kind of motion, ususally made during cross-examination, objecting to a question being asked of a witness. If the objection is successful the question will not have to be answered.

ONTARIO GAZETTE:

An official publication of the Ontario Government in which all all regulations are printed.

PARTICIPANT:

A person who comes to a hearing, but who does not have party status. Members of the audience are participants.

PARTY:

Any person or group allowed by the Board to participate in the hearing, in accordance with the rules of that Board. This includes the proponent and all intervenors. All parties to a hearing are equal. You may become a party by making a written submission and a request for a hearing.

PROJECT:

See Undertaking.

PROPONENT:

A company or Government department proposing to do anything which under The Environmental Assessment Act leads to a hearing before the Environmental Assessment Board.

PROVINCIAL OFFICER:

A person employed by the Ministry who is designated by the Minister to carry out studies or conduct investigations for the Board.

PUBLIC BODY:

A public Corporation, Board, etc. such as Ontario Hydro, that is defined by the regulations as a public body.

RE-EXAMINATION:

After cross-examination of the witness, the portion of the witness' evidence where his own lawyer or representative has the opportunity to ask questions for the purpose of clarifying areas of his evidence that may have become confused.

REGULATIONS:

Regulations made by the Cabinet under The Environmental Assessment Act.

REVIEW:

Is the Government's response to the EA. It is released to the public at the same time as the EA and forms the basis of the Government's case at the hearing.

UNDERTAKING:

The subject matter of a proposal to the Minister for permission to proceed to carry out the undertaking. It may be an activity, enterprise, plan, proposal or program. This book uses undertaking and project interchangeably.

WITNESS:

Any person, whether expert or layman, who testifies as to anything, whether the testimony is oral or in writing.

WRITTEN SUBMISSION:

A written response to the project, EA and review that is submitted to the Minister. It may include a request for a public hearing, although it need not. This document provides a general reaction to the proposal. It need not be particularly detailed, nor does it necessarily restrict the participation at the hearing by those who have submitted it to the items addressed in it.

APPENDIX II

HOW TO DRAFT AN INTERVENTION STATEMENT

(See sample forms attached)

At the top, the Intervention Statement (also called a submission and/or notice requesting a hearing), should tell the Board in which case you are intervening. This can be done by using the case number referred to in the Board's public notice if such a number has been assigned. If no such number has been assigned, you should set out at the top of the page the name of the Act of the Ontario Legislature under which the case is being heard, and the Section of the Act (if you know this--if not, refer to something in the Public Notice of the case from which you learned of the existence of the hearing, or anything which clearly identifies the hearing). Also, include a heading to describe the name of the company or department proposing the project, and the location of the project. Then provide the name and address of the group you represent.

The Intervention Statement should be typed on plain white paper, double spaced, with each paragraph numbered. Each paragraph should be relatively short, if possible. The purpose of the Intervention Statement is not to set out your entire argument at this stage, but merely to indicate who you are, what your interest in the matter is, and a broad outline of the position you intend to take at the public hearing.

The first few numbered paragraphs should set out a general description of your group, including the number of members, where you live, and possibly, how your system of self-government works. Secondly, you should indicate as directly as possible what your interest is by showing how you would be affected by the proposal. In the example used, if you fish in a river which would be dammed, or hunt in an area which would be flooded, make this very clear in your Intervention Statement.

Next, include several paragraphs setting out your objection to the EA and why you feel that that the proposal is not a good idea in spite of the EA.

Finally, indicate in a paragraph (such as number 6 in the sample attached) that you want to participate actively in a

public hearing, and to reserve your rights to cross-examine and to call witnesses, even though you might decide at the hearing that you don't wish to take advantage of all these rights. Also, this might be an appropriate time to request certain supplementary information from the proponent, because you wish to get such a request to the proponent and the Board as quickly as possible. Propose a reasonable deadline for any information you require.

At the bottom of each Intervention Statement should be the name and address of the person submitting the statement, and his title. It should be clear from the title of the person (such as Chief) that he is authorized to make this submission. If not, there should be a paragraph in the Intervention Statement indicating, for example, that the Band Council has met and passed a resolution approving an intervention at the public hearing, and that this intervention is being submitted in support of that resolution. This is important because Boards are normally careful to ensure that persons holding themselves out to be representatives of groups are in fact representatives of that group, and that the group itself has properly authorized such an intervention.

When your Intervention Statement is ready and signed, send a copy to the Board by registered mail, as well as to the proponent. Also, if you are aware of the names and addresses of any of the other parties, send them copies immediately; if not, get their names and addresses from the Board, and send copies of your Intervention Statement as quickly as possible.

SAMPLE ONLY

WRITTEN SUBMISSION AND NOTICE REQUIRING A HEARING (SECTION 7(2))

RE: An Environmental Assessment received from:

The "ABC" Co. Ltd.

for: Construction of a Dam and a Hydro Electric Generating Facility

at: The "DEF" River

Environmental Assessment Number:
(Number available from the Ministry of the Environment)

TO: Minister of the Environment,
135 St. Clair Avenue West,
Toronto, Ontario. M4V 1P5

FROM: The "XYZ" Band

ADDRESS: North of 50

DATE:

SUBMISSION: (On an attached sheet)

HEARING: I require a hearing by the Environmental Assessment Board with respect to the Undertaking, the Environmental Assessment and review thereof.

_____

(Signature)

SAMPLE ONLY

SUBMISSION

Submission Relating to the Undertaking,
the Environmental Assessment and the
Review

RE: Submission of the XYZ Band

1. The XYZ Band has 2,352 members, and lives in the area generally known as "DEF", bounded by the DEF River on the north, the town of JK on the south, etc.

2. The XYZ Band relies for survival on fishing in the "DEF" River for eight months of the year, and, for tourism in the area mentioned in paragraph 1 above.

3. The XYZ Band would, therefore, be materially affected by the proposal of ABC, and accordingly, wishes to oppose the ABC Co.'s application for approval to proceed.

4. The XYZ Band has read the Environmental Assessment of ABC and examined the Review submitted, and believes that this assessment is inadequate and incomplete because:

   (i) it fails to consider . . .
   (ii)
   (iii) etc.

5. The XYZ Band is also opposed to the proposal for the following reasons:

   (i)
   (ii)
   (iii)
   etc.

6. The XYZ Band seeks to participate actively as a party in any hearing into the proposed undertaking and reserves its right to cross-examine witnesses called by other parties and to call evidence of its own.

7. It is requested that ABC be required to provide the XYZ Band with a copy of each of the following studies mentioned in its Undertaking and Environmental Assessment:

   (a)
   (b)
   (c)

   at least two weeks before the public hearing.

Submitted this _____ day of _____, 1980.

BY: _____
(Signature and typed name)
Chief
XYZ Band

(address)

APPENDIX III

GUIDELINES FOR THE ONAKAWANA LIGNITE COAL DEVELOPMENT, ONTARIO

MINISTRY OF THE ENVIRONMENT

INTRODUCTION

A development planned for Onakawana, Territorial District of Cochrane has been designated under The Environmental Assessment Act, 1975. Onakawana Development Limited has proposed the mining of a large lignite deposit in the area, and has obtained a mining lease from the Ministry of Natural Resources. It should be noted that if the Government of Ontario determines that the project would not be in the best interests of Ontario, the lease can be cancelled.

The prime objective of this project as stated by the Government is to provide local long term employment with the least possible adverse effects.

It is not known at present what will be done with the lignite once it is mined. The possibility of the construction of a thermal generating station on the site, with transmission lines linking it to the south, is being investigated. Onakawana Development is looking at the possibility of briquetting the lignite and marketing it in that form.

The environmental assessment designation encompasses the mining activity as well as any related facilities for "the production, storage and transmission of lignite or products derived therefrom, and the restoration of any mined area. "Products include energy".

The objectives of the environmental assessments done under the requirements of The Environmental Assessment Act are:

1. To identify and evaluate all potentially significant environmental effects of proposed undertakings at a stage when alternative solutions, including remedial measures and the alternative of not proceeding are available to decision-makers.

2. To ensure that the proponents of an undertaking and Governmental agencies required to approve the undertaking give due consideration to the means of avoiding or mitigating any adverse environmental effects prior to granting an approval to proceed with the undertaking.

An Environmental Assessment document must be submitted to the Ministry of the Environment setting out how these objectives have been met. Section 5(3) of the Act (see below) states the required content of the EA document. It is not intended that the items listed in Section 5(3) necessarily be used as "chapter headings" nor that the requirements appear in the order in which they appear in the Section.

DISCUSSION OF CONTENT REQUIREMENTS

(a) "A description of the purpose of the undertaking;" It is necessary to have have a clear understanding of the objectives of the activity in order to prepare a description of the project's purpose. A clear statement of purpose will greatly aid in the assessment of the proposed activity. Alternate means of achieving the objectives can then be identified and evaluated or screened. The most acceptable means of meeting the objectives can then be selected by the proponent and put forward as the "undertaking".

(b) "A description of and a statement of the rationale for:

(i) the undertaking
(ii) the alternative methods of carrying out the undertaking
(iii) the alternatives to the undertaking."

The Act requires that alternative ways of meeting the objectives of the proposed activity be described and the rationale for each stated. Alternatives might consist of widely divergent alternatives such as utilizing the lignite for gassification, briquetting, or electrical generation, and alternative ways of carrying out a particular activity such as once-through cooling or strip mining. It is not expected that the proponents describe and explain the rationale for each alternative in equal detail, rather the proponent should first discuss alternatives generally, then as some are rejected, discuss remainder in more detail and so on until only one alternative is left--the proposed undertaking. In discussing the rationale for the proposed activity, the alternative of doing nothing should be considered. It is intended that effects of the 'no-go' alternative be used for evaluating the advantages and disadvantages of the project proceeding.

(c) "a description of,

(i) the environment that will be affected or that might reasonably be expected to be affected directly or indirectly,

(ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and

(iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects that might reasonably be expected upon the environment.

By the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking."

Reiterating a point made in the previous Section, it is not intended that the environmental effects of all alternatives be described in equal detail, rather it is envisaged that a screening process take place with the environmental description provided becoming more detailed for those alternatives which are retained throughout the evaluation process. The intent is to document how the proponent decided to carry out a specific undertaking and to show how environmental considerations were taken into account in deciding the undertaking.

It must be kept in mind that the environment as defined in the Act includes the social, economic and cultural environment as well as the natural environment.

Although it is not a mandatory requirement in conducting this assessment, it is important that the public (especially Native people) be involved in identifying potential impacts of various alternatives and their relative importance to society. The public can help planners focus the investigation by identifying impacts which are of particular concern and warrant investigation in detail. Recognizing the special relationship of Native people to their environment, the nature of a resource-based industry in the North, and the provisions of the Act for public involvement in the formal decision-making process, it is advisable for a proponent to develop a public participation programme with Native and non-Native people before a formal submission is made.

Appended is an illustrative list of environmental characteristics which the Government believes should be examined. The list should not be considered an all-inclusive one and the proponent, when carrying out his investigations, may discover other items which should be discussed or that some items mentioned may not prove to be of concern.

The description of the effects of the project should include both beneficial and detrimental effects. Again, as the proposal becomes less general and more specific, the discussion of effects should become more detailed.

(d) "an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking."

Throughout these guidelines there has been reference to the screening of alternatives until a single alternative has been reached. It is intended that the evaluation of alternatives take place during the environmental assessment process. After the proponent's objectives have been clearly defined, the practical alternatives which might meet the objectives can be identified and described.

The pros and cons of these alternatives can be examined and some quite readily eliminated.

For example, it might be possible to eliminate the underground mining of the lignite very quickly and reasonably on economic or technical feasibility grounds. That alternative need not be discussed after it has been eliminated. As alternatives are eliminated and the project becomes more and more rigidly defined, then a more detailed evaluation would be required.

In describing the pros and cons of alternatives, economic, technical, social, human heritage and natural environmental considerations should be discussed. As this process takes place, the ease with which any adverse effects could be mitigated should be discussed so a true balance of benefits and costs can occur.

At the end of this evaluation process, the ultimate desired undertaking will be identified and described. Its pros and cons will be known as well as those for alternatives which were discarded in the selection process.

It is possible that the overall effects of the chosen undertaking might be such that it should be compared against some previously eliminated alternative. For example, the final examination of a preferred mine drainage design might result in the decision to go back and re-examine a previously discarded alternative.

PROJECT DESCRIPTION

The description of the undertaking should include the following information. The proponent should include any additional information or data which comes to the proponents attention as being important in the decision-making process.

1. GENERAL

type(s) of undertaking chosen, i.e. strip mine, generating station, etc.

initial size, phasing, ultimate desired size intended on stream data for mine, G.S. or briquetting plant, etc.

- life expectancy of mine
- additional servicing facilities
  - railway upgrading
  - roads construction (if any)
  - other utilities
- labour force size, consider relationship to phasing of construction.
  - utilization of local and outside work forces
  - operating force size
  - qualification (breakdown into skilled, unskilled temporary, permanent, etc.)
  - number of new residences such as:
    - servicing and utilities
    - community servicing
    - training and employment opportunities for Native and non-Native peoples.

2. CONSTRUCTION

- timing
  - for each phase of the undertaking
  - site clearing
  - mine preparation
  - site preparation for processing facilities, e.g. briquetting operating

- living areas (if special camp is to be located on/ near site)
- storage area(s)
- phasing of construction
- procedures for
  - clearing
  - site preparation
  - any filling required

3. OPERATING PROCEDURES

- mining plan
- processing plant operating procedures
- noise - criteria, monitoring procedure
- testing and analysis of any effluents generated, e.g.
- listing of any and all other likely contaminants having potential for human health hazards
- treatment proposals and expected levels of discharge related to possible fate in the ecosystem
- peak periods
- emergencies - contingency plans
- reporting mechanisms (to whom, and when?)
  - day to day
  - emergencies
  - emissions
- monitoring
  - inside and outside of plant
  - off plant operations, emissions
- other

ALTERNATIVES EVALUATION

The following is a list of factors used in the evaluation of the alternatives. While it is not expected that all of these items will enter into the alternative evaluation process at every stage, the final undertaking design should reflect those factors which are relevant to the environment of the area.

Each part of the list is divided into two sections:

a) a listing of concerns government ministries have over effects the project might have on that particular aspect of the environment, and

b) information required in order to satisfy these concerns.

PART 1 - INVENTORY

1. PHYSICAL TERRAIN

(i) Geological Characteristics

(a) - potential effects of faulting
- effect of accelerated weathering
- effect on unique features, notable deposits (e.g. fossils)

(b) - topography
- stratigraphy, geomorphology
- weathering, geochemistry
- unique or significant fossils
- precious and significant fossils
- precious and semi-precious rock areas
- unique features
- other

(ii) Soils and Stability

(a) - predicted effects of permanent facilities on stability (i.e. steep banks, dust, erosion of spoil piles, etc.)
- effects of construction on stability (including above, and dust, sheet erosion, changes to terrain, etc.)
- potential effects on facility due to subsidence (settling)

(b) - slopes
- stability
- structural roads
- rock fall

- soil types - location - temperatures - composition
- soil stability (related to soil types and particular terrain features)
- depth of overburden
- erodibility
- disposal of excess soil material
- permeability
- subsidence
- other

(iii) Seismic Action

(a) - effect of historical activity on site to date
- potential for contamination release due to structural damage

(b) - local seismic activity
- distance seismic activity (i.e. identify that nearest to site)
- public safety aspects
- probability of activity
- other

2. AIR QUALITY

(i) Air Quality

(a) - plant contaminants - toxic effects
- on-site deterioration
- effect on neighbouring persons and/or communities
- potential effects on employees
- existing air quality on-site - background contaminants
- existing air quality off-site - background contaminants
- phytotoxicology data/parameters

(ii) Dispersion Climatology

(a) - wind speeds/direction/erosion potential
- mixing heights

- frequency of inversions
- mixing conditions
- limitations of topography (e.g. valley and canyon sites)
- wind directions and frequency
- air quality and standards in areas, and within potential zone of impact
- atmospheric stability
- natural heat flux
- number and locations of heat sources (having potential influence around site)
- potential points of impingement
- other

(b) - predicted air dispersions
- under all possible conditions
- impingement (and frequency)
- inversions
- interaction with other sources
- predicted microclimatic change

(iii) Fogging and Icing

(a) - magnitude of possible natural fog concentrations
- areas prone to fog
- type
- major transportation routes
- possible impingement from facility
- other

(b) - potential for addition to fog/ice conditions because of facilities must consider worst case
- point of impingement of water vapour from all sources
- effect on adjacent land uses

3. WATER RESOURCES

(i) General

Those noted under "Inventory" (Section III) should be discussed in relation to the likelihood of potential effects.

The examples of policy considerations listed below should be considered in light of the site being studied. Those considerations having a potential role in the decision-making process should be noted. Any others coming to the attention of the proponent and not listed should also be included.

- riparian rights
- shoreline rights
- policy on water taking
- long range water management plans
- flood management plans
- groundwater
- combined effects
- water use policies and priorities
- water uses for recreation, sport fisheries, commercial fishing, transportation, potable water supply etc.
- other

(ii) Physical

(a) - meterological parameters affecting thermal plume dispersal and cooling
- currents
- groundwater-location; recharge-discharge area - effects of spoil piles leachate
- impoundments
- set-up and seiches

(b) - impact of continued operation under potential off-standard conditions
- storm water implications
- effects of icing
- changes in groundwater, levels-recharge
- river diversions
- settling ponds

(iii) Chemicals

(a) - effects on water quality parameters
(b) - conventional parameters for water quality survey (solids, nutrients, trace)
- pathways of concentration of probable effluents

(iv) Biological

(a) - aquatic macrophytes
- microbiology (bacteriology)
- benthic macroinvertebrates
- planktonic macroinvertebrates
- fish
- amphibians and reptiles
- waterfowl
- water dwelling animals

These topics should be emphasized:

- species biology
- seasonal population levels
- movements (e.g. spawning runs)
- reproduction
- food web relationships
- substrate relationships
- their temperature requirements at various times of the year
- key factors controlling population levels

(b) - the biological studies completed in the alternative selection stage should be reconsidered in conjunction with MOE in light of the chosen alternative for the possible need for additional evaluation.

(a) - potential for effect
  - short term, long term
- displacement of habitat
- ability of species to adjust

(b) - identification of rare and endangered species (plant or animal) as defined by any public agency
- note habitat, breeding area, range, feeding area and food
- ability to adapt

5. EXISTING LAND USE

(i) Planning (Stated and Implied)

(a) - impact on and relationship to:
  - Provincial Government plans
  - regional plans
  - native community plans
  - watershed plans
  - other

(b) - provincial ministry plans and programs
- regional and special commission plans
- federal lands and reserves and federal treaties
- rights on lands
- watershed plans

(ii) Non-agricultural

(a) - effects on, or limitations to resource mining
- changes to recreational patterns
- near and far-field effects on forestry due to air contaminants
- changes in urban land use patterns

(b) - all existing land use within area of potential effect
- mineral resources such as:
  - potential oil and gas pools
  - existing and potential pits and quarries
  - other known mineral deposits
- forest resources

6. SOCIAL AND CULTURAL AND ECONOMIC

Recognizing the differences between various peoples in the North, the proposed development should be addressed as to its effects on different cultures. Different methods may be necessary to identify and evaluate the concerns these groups may have with the project. One set of criteria that may be used to help in this assessment may include the following items:

(i) Health and Safety

(a) - effect under normal conditions
- increase over ambient
- consider air, water, land releases
- safety measures to minimize

(b) - federal criteria
- provincial criteria

(ii) Communities

(a) - updated demographic income distribution forecast
- effects on population distribution
- alteration of labour forces
- effects on local industries, government (Native, non-Native)
- community impacts of project - primary and secondary
  - housing demand projections and current availability
  - education

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- servicing adequacy to meet present and projected demands
- transportation (e.g. commuting from workplace to home)

- financing programs for increased community servicing
- public participation

(b) - population distribution
- labour force availability
- important industrial areas
- housing availability
- servicing availability - limits
- existing wage structures
- transportation

Communities (Native Peoples - including Status and Non-Status Indians, Metis)

- cultural ecology
  - identification of residence patterns of Native peoples in the study area (bands, reserves, towns, traditional groupings, etc.)
  - identify patterns of livelihood:
    - native peoples participation in the wage economy
    - native peoples participation in traditional economic activities
      - hunting
      - trapping — for self-consumption
      - fishing
      - gardening — monetary value (income)
      - other

- relationships with natural environment
- identification of Government involvement in Native communities

- services
- economic support

- Native people's plans and aspirations in the context of the proposed development
- identification of sites, landscape features of cultural significance to Native people in study area
- effects of undertaking on the cultural ecology of the Native peoples
  - e.g.
  - effects on current lifestyles
  - effects on local environment
  - effects on employment (unemployment)
- an outline of the proposed Company employment and training program for Native peoples

(iii) Historic Sites

(a) - human heritage resources - identified potential effects of the preconstruction and operation phase of the project on the heritage resources identified in the inventory.

(b) - human resources heritage or cultural landscape areas
- the application with existing or potential archaeological historical and/or architectural resources that may be affected
- statement of the significance of the resources

(iv) Economic

- direct benefits and costs of the project to the proponent, local residents, government and government agencies
- individual benefits and costs of the project to the above mentioned.

7. NOISE
   - allowable criteria
   - potential from plant
   - upset conditions

MITIGATION

This should relate to the Inventory and Effect Prediction of the preferred alternative to the project description. The purpose being, designing to minimize all detrimental effects during construction and operation both on-site and off-site. This will mean some trade-offs by the proponents and should consider both on-site and off-site impacts. The following list does not preclude the addition of subsequent details which the foregoing studies have recognized.

ON-SITE

Construction

- site preparation/improvement
- construction grading
- construction camp
- storage of materials
- site boundary effects
- education of personnel
- restoration/rehabilitation
- large scale utilization of local work forces

Operation

- waste emissions, i.e. pump water and runoff disposal
- dust control
- fuel storage
- product transportation
- maintenance
- noise
- training of local residents
- protection of employees
- control of negative interaction between labour force and local communities

RESTORATION

Considerable concern has been expressed over the rehabilitation of the spoil piles and ponds which strip mining creates. In the case of Onakawana, the question does not appear to be whether or not the area can be restored since preliminary work shows that the spoil piles are not likely to be toxic - rather, the question is the cost of restoration. Are the costs of restoration such that the whole operation remains viable?

It has been stated by the proponent and government officials that the restored area could be left more productive than it is now. The restoration plan should contain a proposed land use; how that land use is to be achieved through restoration and re-vegetation. Studies should be carried out to verify that the proposed land use is both feasible and practicable. Suggestions which have come forth range from agricultural to forestry to recreational hunting. The alternative land uses should be discussed and the potential benefits and costs of each determined.

It will no doubt be necessary to level out the spoil banks to a point where both gully and sheet, erosion are minimized and vegetation can rapidly take hold. Studies should be carried out to determine the necessary slope angles and what must be done to the slope surface to make rapid re-vegetation possible.

Along with the spoil piles, other waste disposal areas will have to be restored. This includes construction of waste disposal areas, ash lagoons, solid waste or liquid disposal areas and sanitary waste disposal areas.

The degree of restoration required and which can be feasibly carried out will have to be determined. The minimum restoration required is the stabilization of the spoil piles through re-vegetation and the prevention of the deterioration of water quality in the Abitibi, Mattagami or Onakawana Rivers. The area will have to be left aesthetically pleasing rather than as a potential eye sore.